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Kirchwey, George Washington.

KIRCHWEY'S CASES

ON THE

LAW OF MORTGAGE

SECOND EDITION

BY

M. W.
MAURICE WORMSER

PROFESSOR OF LAW, FORDHAM UNIVERSITY LAW SCHOOL
AUTHOR OF CASEBOOKS ON CORPORATIONS,
CONTRACTS, ETC.

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to

DEAN HARLAN F. STONE AND HIS COLLEAGUES ON
THE LAW FACULTY OF COLUMBIA UNIVERSITY
THE SECOND EDITION OF THIS WORK IS
DEDICATED, AS A SLIGHT MARK
OF ITS AUTHOR'S ESTEEM
AND APPRECIATION.

I. M. W.

750472

PREFACE TO SECOND EDITION

Kirchwey's Cases on the Law of Mortgage appeared in 1902 and at once met with a favorable reception. The work has since been used as the basis of instruction in many leading law schools. In the last fifteen years many decisions on mortgage law have been rendered, and a new edition has become necessary. The editor of the present edition has sought to include a number of the recent cases of importance and, in particular, some specimens of valuable present-day opinion-writing. These opinions demonstrate that our courts of equity, far from being decadent, are, on the other hand, fully alive to new conditions and are eager and anxious to adjust the rules of equity to the needs of the community. The recent cases printed in this edition, dealing with Agreements for Collateral Advantage and Clogging the Equity of Redemption, furnish a striking illustration of this.

Chapters have been added dealing with the subjects of Priorities and of Special Equities Coupled with the Mortgage Relation such as Contribution, Exoneration, Subrogation and Marshalling. Cases have also been inserted dealing with the topic of the Enforcement of the Mortgage by the Mortgagee, as an adequate treatment of mortgage law demands some consideration of foreclosure proceedings.

In the preparation of this edition some attention has been directed to Corporate and Railroad Mortgages, although it has become clear in the last few years that this is, in itself, a subject which demands more especial attention from the law schools than it has hitherto received. The preparation and enforcement of corporate bonds and mortgages, particularly of quasi-public corporations, might profitably constitute the subject-matter of an elective law course. It is clear that in the time now allotted to the course on mortgages in law schools due consideration cannot be devoted to this branch of the subject.

The editor has refrained from over-indulgence in footnotes. A case book is not intended to serve the functions of an encyclopedia or of a text-book. In some instances, however, additional notes have been deemed necessary.

Acknowledgment is made to the editor's friends, John Norton Pomeroy and Harlan F. Stone, for helpful suggestions.

I. MAURICE WORMSER.

New York, N. Y., April, 1917.

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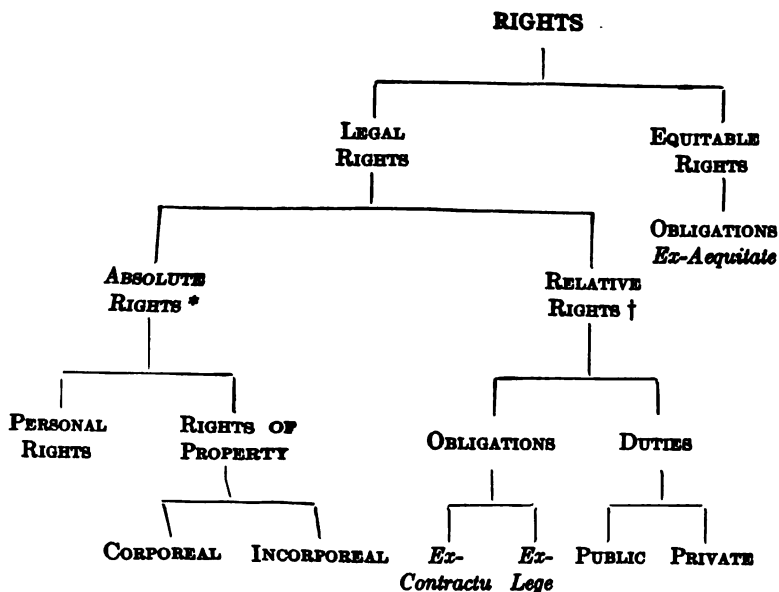
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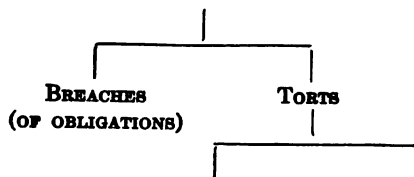
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CLASSIFICATION OF RIGHTS AND WRONGS

(Langdell: 13 Harvard Law Rev. 537, 639;
Brief Survey of Equity Jurisdiction, 220)



WRONGS



* Generally called rights *in rem*.

† Generally called rights *in personam*.

AFFIRMATIVE
(VIOLATIONS OF AN
ABSOLUTE RIGHT)

NEGATIVE
(VIOLATIONS OF A
PRIVATE DUTY)

SELECT CASES ON THE LAW OF MORTGAGE

BOOK I

INTRODUCTION: PROPERTY SECURITY FOR DEBT

(a) *Pledge and Hypothecation*

LANGDELL, CLASSIFICATION OF RIGHTS AND WRONGS, 13 HARV. L. R. 539, 540. An obligation is either personal or real, according as the obligor is a person or a thing. . . .

A real obligation is undoubtedly a legal fiction, but it is a very useful one. It was invented by the Romans, from whom it has been inherited by the nations of modern Europe. That it would ever have been invented by the latter is very unlikely, partly because they have needed it less than did the ancients, and partly because they have not, like the ancients, the habit of personifying inanimate things. The invention was used by the Romans for the accomplishment of several important legal objects, some of which no longer exist, but others still remain in full force. It was by means of this that one person acquired rights in things belonging to others (*jura in rebus alienis*). Such rights were called *servitutes* (*i. e.*, states of slavery) in respect to the thing upon which the obligation was imposed, and they included every right which one could have in a thing, short of owning it. These servitutes were divided into real and personal servitutes, being called real when the obligee as well as the obligor, *i. e.*, the master (*dominus*) as well as the slave (*servus*), was a thing, and personal when the obligee was a person. The former, which may be termed servitutes proper, have passed into our law under the names of easements and profits *d prendre*. The latter included the *pignus* and the *hypotheca*, *i. e.*, the Roman mortgage—which was called *pignus* when the thing mortgaged was delivered to the creditor, and *hypotheca* when it was constituted by a mere agreement, the thing mortgaged remaining in the possession of its owner. Originally, possession by the creditor of the thing mortgaged was indispen-

sable, and so the *pignus* alone existed; but, at a later period, the parties to the transaction were permitted to choose between a *pignus* and a *hypotheca*. So long as the *pignus* was alone in use, it is obvious that the obligation could be created only by the act of the parties, as they alone could change the possession of the property. But when the step had been taken of permitting the mere agreement of the parties to be substituted for a change of possession, it was another easy step for the law, whenever it saw fit, to substitute its own will for the agreement of the parties; and hence hypothecations came to be divisible into such as were created by the acts of the parties (conventional hypothecations), and such as were created by the act of the law (legal or tacit hypothecations). Again, so long as a change of possession was indispensable, it is plain that the obligation could attach only upon property which was perfectly identified, and that there could be no change in the property subject to the obligation, except by a new change of possession. But when a change of possession had been dispensed with, and particularly when legal or tacit hypothecations had been introduced, it became perfectly feasible to make the obligation attach upon all property, or all property of a certain description, either then belonging to the debtor or afterward acquired by him, or upon all property, or all property of a certain description, belonging to the debtor for the time being; and hence hypothecations came to be divided into those which were special and those which were general.

The *pignus* has passed into our law under the name of pawn, or pledge, as to things movable, but has been wholly rejected as to land. The conventional *hypotheca* has been wholly rejected by our common law, though it has passed into our admiralty law. The legal or tacit hypothecation, on the other hand, has been admitted into our common law to some extent, though under the name of lien (a word which has the same meaning and the same derivation as "obligation"). Thus, by the early statute of 13 E. I., c. 18, a judgment and a recognizance (the latter being an acknowledgment of a debt in a court of record, of which acknowledgment a record is made) are a general lien on all the land of the judgment debtor and recognizor respectively, whether then owned by them or afterwards acquired. So also, in many cases, the law gives to a creditor a similar lien on the debtor's movable property, already in the creditor's possession when the debt accrues, though, in respect to the creditor's possession, this lien has the features of a *pignus* rather than of a *hypotheca*.

GLANVILLE, Lib. X., c. 6 (Beames). A Loan is sometimes made upon the Credit of a putting in Pledge. When a Loan of this description takes place, sometimes moveables, as Chattels, are put in pledge; sometimes immoveables, as Lands and Tenements, and Rents, whether consisting in Money or in other things. When a Compact is made between a Creditor and Debtor, concerning the putting anything in pledge, then, whatever be the mode of pledging, the Debtor upon his receiving the thing lent to him, either immediately delivers possession of the Pledge (*vadii seisinam*) to the Creditor, or not. Sometimes also a thing is pledged for a certain period, sometimes indefinitely. Again, sometimes a thing is pledged as a Mortgage (*in mortuo vadio*), sometimes not. A pledge is designated by the term Mortgage when the fruits and Rents, which are received in the interval, in no measure tend to reduce the demand for which the pledge has been given. When, therefore, moveables are put in pledge, so that possession be delivered to the Creditor for a certain period, he is bound to keep the pledge safely, and neither to use it, nor in any other manner employ it, so as to render it of less Value. But should it, whilst in Custody and within the Term, suffer deterioration, by the fault of the creditor, a Computation shall be made to the extent of the detriment and deducted from the Debt. But if the thing be of such a description that it necessarily requires some expense and cost, for Example, that it might be fed or repaired, then the stipulation of the parties on that subject shall be abided by. In addition—when a thing is pledged for a definite period, it is either agreed between the Creditor and Debtor, that if, at the time appointed, the Debtor should not redeem his pledge, it should then belong to the Creditor so that he might dispose of it as his own; or no such agreement is entered into between them. In the former case, the Agreement must be adhered to; in the latter, the Term being unexpired without the Debtor's discharging the Debt, the Creditor may complain of him, and the Debtor shall be compelled to appear in Court, and answer by the following Writ.

c. 7. "The King to the Sheriff, Health: Command N. that justly and without delay, he redeem such a thing which he has pledged to R. for a hundred Marks, for a Term which is past, as he says, and of which he complains that he has not redeemed it; and, unless he does so, &c."

c. 8. . . . When a Compact is entered into between a Debtor and Creditor, concerning the pledging of a particular thing, if the Debtor, after having received the Loan, should not deliver the

pledge; it may be asked, what step should the Creditor have recourse to in such a case, especially as the same thing may be pledged to many other Creditors, both previously and subsequently? Upon this subject, it should be remarked, that the King's Court is not in the habit of giving protection to or warranting private Agreements of this description, concerning the giving or accepting things in pledge, or others of this kind, made out of Court, or even in any other Court than that of the King. If, therefore, such Compacts are not observed, the King's Court does not interfere; and hence it is not bound to answer concerning the right of different Creditors, as prior or subsequent, or respecting their privileges.

But, when an immoveable thing is put into pledge, and Seisin of it has been delivered to the Creditor for a definite term, it has either been agreed between the Creditor and Debtor, that the proceeds and rents shall in the meantime reduce the Debt, or that they shall in no measure be so applied. The former Agreement is just and binding; the other, unjust and dishonest, and is that called a Mortgage, but this is not prohibited by the King's Court, although it considers such a pledge as a species of Usury. Hence, if any one die having such a pledge, and this be proved after his death, his property shall be disposed of no otherwise than as the Effects of a Usurer. In other respects, the same Rules should be observed as in pledges of moveables, concerning which we have already spoken. But it must be remarked, that if, after any one has paid his Debt, or has in a proper manner tendered it, the Creditor should maliciously detain the pledge, the Debtor upon complaining to the Court shall have the following Writ:

c. 9. "The King to the Sheriff, Health: Command N. that justly and without delay he render to R. the whole Lands, or such Lands, in such a Vill, which he has pledged to him for a Hundred Marks for a term which is past, as he says, and has received his Money, or which he has redeemed, as he says; and, unless he does so, Summon him by good, etc."

c. 11. If the Creditor lose his Seisin, either by means of the Debtor, or any other person, he cannot recover it through the assistance of the Court; not even by a Recognition of Novel Disseisin. For if he was unjustly and without a judgment disseised of his pledge, by any other person than the Debtor himself, the Debtor may have an Assise of Novel Disseisin. If, however, the Creditor was disseised by the Debtor himself, the Court will not assist him against the Debtor, in recovering his pledge, or in giv-

ing a Re-entry, unless through the Debtor himself; for the Creditor should resort to an original Plea of Debt, in order that the Debtor may be compelled to render him satisfaction for his Debt. In such case the debtor shall be summoned by the foregoing Writ of first summons.¹

(b) *The Common Law Mortgage*

LIT. § 332. *Of Estates upon Condition.* Item, if a feoffment be made upon such condition, that if the feoffor pay to the feoffee at a certain day, &c., 40 pounds of money, that then the feoffor may re-enter, &c.; in this case the feoffee is called tenant in mortgage, which is as much to say in French as *mort gage*, and in Latin *mortuum vadium*. And it seemeth that the cause why it is called mortgage is, for that it is doubtful whether the feoffor will pay at the day limited such sum or not: and if he doth not pay, then the land which is put in pledge upon condition for the payment of the money, is taken from him forever, and so dead to him upon condition, &c. And if he doth pay the money, then the pledge is dead as to the tenant, &c.

§ 333. Also, as a man may make a feoffment in fee in mortgage, so a man may make a gift in taylor in mortgage, and a lease for term of life, or for term of years in mortgage. And all such tenants are called tenants in mortgage, according to the estates which they have in the land, &c.

§ 334. Also, if a feoffment be made in mortgage upon condition that the feoffor shall pay such a sum at such a day, &c., as is between them by their deed indented agreed and limited, although the feoffor dieth before the day of payment, &c., yet if the heir of the feoffor pay the same sum of money at the same day to the feoffee, or tender to him the money, and the feoffee refuse to receive it, then may the heir enter into the land, and yet the condition is, that if the feoffor shall pay such a sum at such a day, &c., not making mention in the condition of any payment to be made by his heir, but for that the heir hath interest of right in the condition, &c., and the intent was but that the money should be paid at the day assessed, &c., and the feoffee hath no more loss, if it be paid by the heir, than if it were paid by the father, &c.; therefore, if the heir pay the money, or tender the money at the day limited, &c., and the other refuse it, he may enter, &c. But if a stranger of his own head, who hath not any interest, &c., will tender the

¹ See, also, Spence, Eq. Juris. 601.

aforesaid money to the feoffee at the day appointed, the feoffee is not bound to receive it.

§ 335. And be it remembered that in such case, where such tender of the money is made, &c., and the feoffee refuse to receive it, by which the feoffor or his heirs enter, &c., then the feoffee hath no remedy by the common law to have this money, because it shall be accounted his own folly that he refused the money, when a lawful tender of it was made unto him.

§ 337. Also, if a feoffment be made upon condition, that if the feoffor pay a certain sum of money to the feoffee, then it shall be lawful to the feoffor and his heirs to enter: in this case if the feoffor die before the payment made, and the heir will tender to the feoffee the money, such tender is void, because the time within which this ought to be done is passed. For when the condition is, that if the feoffor pay the money to the feoffee, &c., this is as much to say, as if the feoffor during his life pay the money to the feoffee, &c., and when the feoffor dieth, then the time of the tender is passed. But otherwise it is where a day of payment is limited, and the feoffor die before the day, then may the heir tender the money as is aforesaid, for that the time of the tender was not passed by the death of the feoffor. Also, it seemeth, that in such case where the feoffor dieth before the day of payment, if the executors of the feoffor tender the money to the feoffee at the day of payment, this tender is good enough; and if the feoffee refuse it, the heirs of the feoffor may enter, &c. And the reason is, for that the executors represent the person of their testator, &c.

§ 338. And note, that in all cases of condition for payment of a certain sum in gross touching lands or tenements, if lawful tender be once refused, he which ought to tender the money is of this quit, and fully discharged forever afterwards.

Co. Lit. 209, a, b. This is to be understood, that he that ought to tender the money is of this discharged forever to make any other tender; but if it were a duty before, though the feoffor enter by force of the condition, yet the debt of duty remaineth. As if A. borroweth a hundred pounds of B., and after morgageth land to B. upon condition for payment thereof. If A. tender the money to B. and he refuseth it, A. may enter into the land, and the land is freed forever of the condition, but yet the debt remaineth, and may be recovered by action of debt. But if A. without any loan, debt or duty preceding infeoff B. of land upon condition for the payment of a hundred pounds to B. in nature of a gratuity or gift.

In that case if he tender the hundred pounds to him according to the condition, and he refuseth it, B. hath no remedy therefor, and so is our author in this and his other cases of like nature to be understood.

LIT. § 339. Also, if the feoffee in mortgage before the day of payment which should be made to him, makes his executors and die, and his heir entereth into the land as he ought, &c., it seemeth in this case that the feoffor ought to pay the money at the day appointed to the executors, and not to the heir of the feoffee, because the money at the beginning trenched to the feoffee in manner as a duty, and shall be intended that the estate was made by reason of the lending of the money by the feoffee, or for some other duty; and, therefore, the payment shall not be made to the heir, as it seemeth, but the words of the condition may be such, as the payment shall be made to the heir. As if the condition were, that if the feoffor pay to the feoffee or to his heirs such a sum at such a day, &c., there after the death of the feoffee, if he dieth before the day limited, the payment ought to be made to the heir at day appointed, &c.

2 BLACKSTONE, COM. 157. There are some estates defeasible upon condition subsequent, that require a more peculiar notice. Such are:—

Estates held *in vadio*, in *gage*, or pledge, which are of two kinds, *vivum vadium*, or living pledge, and *mortuum vadium*, dead pledge, or *mortgage*.

Vivum vadium, or living pledge, is when a man borrows a sum (suppose £200) of another, and grants him an estate, as of £20 *per annum*, to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be void, as soon as such sum is raised. And in this case the land or pledge is said to be living: it subsists, and survives the debt; and immediately on the discharge of that, results back to the borrower. But *mortuum vadium*, a dead pledge or *mortgage* (which is much more common than the other), is where a man borrows of another a specific sum (*e. g.*, £200) and grants him an estate in fee, on condition that if he, the mortgagor, shall repay the mortgagee the said sum of £200 on a certain day mentioned in the deed, that then the mortgagor may re-enter on the estate so granted in pledge; or, as is now the more usual way, that then the mortgagee shall reconvey the estate to the mortgagor. In this case, the land, which is so put in pledge,

is by law, in case of non-payment at the time limited, forever dead and gone from the mortgagor; and the mortgagee's estate in the lands is then no longer conditional, but absolute.¹ But, so long as it continues conditional, that is, between the time of lending the money and time allotted for payment, the mortgagee is called tenant in mortgage. But as it was formerly a doubt, whether, by taking such estate in fee, it did not become liable to the wife's dower and other incumbrances of the mortgagee (though that doubt has been long ago overruled by our courts of equity), it, therefore, became usual to grant only a long term of years by way of mortgage, with condition to be void on repayment of the mortgage money, which course has been since pretty generally continued principally because on the death of the mortgagee such term becomes vested in his personal representatives, who alone are entitled in equity to receive the money lent, whatever nature the mortgage may happen to be.

As soon as the estate is created, the mortgagee may immediately enter upon the lands; but is liable to be dispossessed, upon performance of the condition by payment of the mortgage money at the day limited. And, therefore, the usual way is to agree that the mortgagor shall hold the land till the day assigned for payment; when, in case of failure, whereby the estate becomes absolute, the mortgagee may enter upon it and take possession, without any possibility *at law* of being afterward evicted by the mortgagor, to whom the land is now forever dead. But here again the courts of equity interpose, and though a mortgage be thus forfeited, and the estate absolutely vested in the mortgagee at the common law, yet they will consider the real value of the tenements compared with the sum borrowed. And, if the estate be of greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time to recall or redeem his estate; paying to the mortgagee his principal, interest and expenses; for otherwise, in strictness of law, an estate worth £1000 might be forfeited for non-payment of £100, or a less sum. This reasonable advantage, allowed to mortgagors, is called the *equity of redemption*; and this enables a mortgagor to call on the mortgagee who has possession of his estate, to deliver it back and account for the rents and profits received, on payment of his whole debt and interest; thereby turning the *mortuum* into a kind of *vivum vadium*. But on the other hand, the mortgagee may either compel the sale of the estate in order to get the whole of his money immediately, or else call upon the mort-

¹ But see, Coote on Mortgage, 5, 9.

gagor to redeem his estate presently, or in default thereof, to be forever *foreclosed* from redeeming the same; that is, to lose his equity of redemption without possibility of recall. And also, in some cases of fraudulent mortgages, the fraudulent mortgagor forfeits all equity of redemption whatsoever. It is not, however, usual for mortgagees to take possession of the mortgaged estate unless where the security is precarious, or small; or where the mortgagor neglects even the payment of interest; when the mortgagee is frequently obliged to bring an ejectment, and take the land into his own hands in the nature of a pledge, or the *pignus* of the Roman law; whereas, while it remains in the hands of the mortgagor, it more resembles their *hypotheca*, which was, where the possession of the thing pledged remained with the debtor. But by statute 7 Geo. II., c. 20, after payment or tender by the mortgagor of principal, interest and costs, the mortgagee can maintain no ejectment, but may be compelled to re-assign his security. In Glanvil's time, when the universal method of conveyance was by livery of seisin or corporal tradition of the lands, no gage or pledge of lands was good unless possession was also delivered to the creditor: "*Si non sequatur ipsius vadii traditio, curia domini regis hujusmodi privatas conventiones tueri non solet*;" for which the reason given is, to prevent subsequent and fraudulent pledges of the same land, "*Cum in tali casu possit eadem res pluribus aliis creditoribus tum prius tum posterius invadiari*." And the frauds which have arisen, since the exchange of these public and notorious conveyances for more private and secret bargains, have well evinced the wisdom of our ancient law.

4 KENT, COM. 140. The law of pledges shows an accurate and refined sense of justice; and the wisdom of the provisions by which the interests of the debtor and creditor are equally guarded, is to be traced to the Roman law, and shines with almost equal advantage, and with the most attractive simplicity, in the pages of Glanville.

It forms a striking contrast to the common-law mortgage of the freehold, which was a feoffment upon condition, or the creation of a base or determinable fee, with a right of reverter attached to it. The legal estate vested immediately in the feoffee, and a mere right of re-entry, upon performance of the condition, by payment of the debt strictly at the day, remained with the mortgagor and his heirs, and which right of entry was neither alienable nor devisable. If the mortgagor was in default, the condition was forfeited, and the

estate became absolute in the mortgagee, without the right or the hope of redemption. So rigorous a doctrine, and productive of such forbidding, and, as it eventually proved, of such intolerable injustice, naturally led to exact and scrupulous regulations concerning the time, mode, and manner of performing the condition, and they became all-important to the mortgagor. The tender of the debt was required to be at the time and place prescribed; and if there was no place mentioned in the contract, the mortgagor was bound to seek the mortgagee, and a tender upon the land was not sufficient. If there was no time of payment mentioned, the mortgagor had his whole lifetime to pay, unless he was quickened by a demand; but if he died before the payment, the heir could not tender and save the forfeiture, because the time was passed. If, however, the money was declared to be payable by the mortgagor, or his heirs, then the tender might be made by them at any time indefinitely after the mortgagor's death, unless the performance was hastened by request; and if a time for payment was fixed, and the mortgagor died in the meantime, his heir might redeem, though he was not mentioned, for he had an interest in the condition. If the representatives of the mortgagee were mentioned in the feoffment, whether they were heirs, executors, or assignees, the payment could rightfully be made to either of them.¹

Id. 158. In ascending to the view of a mortgage in the contemplation of a court of equity, we leave all these technical scruples and difficulties behind us. Not only the original severity of the common law, treating the mortgagor's interest as resting upon the exact performance of a condition, and holding the forfeiture or the breach of a condition to be absolute, by non-payment or tender at the day, is entirely relaxed; but the narrow and precarious character of the mortgagor at law is changed, under the more enlarged and liberal jurisdiction of the courts of equity. Their influence has reached the courts of law, and the case of mortgages is one of the most splendid instances in the history of our jurisprudence, of the triumph of equitable principles over technical rules, and of the homage which those principles have received by their adoption

¹ Goodall's case, 5 Co. 95; Co. Litt. 210. This case of Goodall, and Wade's case, 5 Co. 114, are samples of the discussions on what was, in the time of Lord Coke, a very momentous question, whether the absolute forfeiture of the estate had or had

not been incurred by reason of non-payment at the day. Such a question, which would now be only material as to the costs, was in one of those cases decided, on error from the K. B., after argument and debate, by all the judges of England.—*Kent*.

in the courts of law. Without any prophetic anticipation, we may well say, that "returning justice lifts aloft her scale." The doctrine, now regarded as a settled principle, was laid down in the reign of Charles I., very cautiously, and with a scrupulousness of opinion. "The Court conceived, as it was observed in chancery, that the said lease being but a security, and the money paid; though not at the day, the lease ought to be void in equity."¹ The equity of redemption grew in time to be such a favorite with the courts of equity, and was so highly cherished and protected, that it became a maxim, that "once a mortgage, always a mortgage." The object of the rule is to prevent oppression; and contracts made with the mortgagor, to lessen, embarrass or restrain the right of redemption, are regarded with jealousy, and generally set aside as dangerous agreements, founded in unconscientious advantages assumed over the necessities of the mortgagor. . . .

The equity doctrine is, that the mortgage is a mere security for the debt, and only a chattel interest, and that until a decree of foreclosure, the mortgagor continues the real owner of the fee. The equity of redemption is considered to be the real and beneficial estate, tantamount to the fee at law; and it is accordingly held to be descendible by inheritance, devisable by will, and alienable by deed, precisely as if it were an absolute estate of inheritance at law.² The courts of law have, also, by a gradual and almost insensible progress, adopted these equitable views of the subject, which are founded in justice, and accord with the true intent and inherent nature of every such transaction. Except as against the mortgagee, the mortgagor, while in possession, and before foreclosure, is regarded as the real owner, and a freeholder, with the civil and political rights belonging to that character; whereas the mortgagee, notwithstanding the form of the conveyance, has only a chattel interest, and his mortgage is a mere security for a debt.

¹ *Emmanuel College v. Evans*, 1 Rep. in Ch. 10. In the case of *Roscarick v. Barton*, 1 Cases in Ch. 217, Sir Matthew Hale, when chief-justice, showed that he had not risen above the mists and prejudices of his age on this subject, for he complained very severely of the growth of equities of redemption, as having been too much favored, and been carried too far. In 14 Rich. II., the Parliament, he said, would not admit

of this equity of redemption. By the growth of equity, the heart of the common law was eaten out. He complained that an equity of redemption was transferable from one to another, though at common law a feoffment or fine would have extinguished it; and he declared he would not favor the equity of redemption beyond existing precedents.—*Kent*.

² 1 Vern. 7, 232, and 2 Vent. 364.—*Kent*.

This is the conclusion to be drawn from a view of the English and American authorities.¹

TROWBRIDGE, READING ON MORTGAGES, 8 Mass. Rep. 551. Among conditional estates are mortgages of land and tenements. These are sometimes of the freehold and inheritance, and sometimes for a term of years only.

1. Of the freehold and inheritance: Where a feoffment is made upon condition, that if the feoffor pay the feoffee £40 at a certain day, then he shall re-enter, &c. Here the land and all the feoffor's estate in it pass presently to the feoffee by common law; and the feoffor has only the condition left, and no estate in the land that he can assign over (Co. Lit. 205 a, 210 a). So if one here, by deed duly acknowledged and registered, conveys his land to another and his heirs upon the like condition, the land and all the mortgagor's estate in it pass presently to the mortgagee by force of the provincial act of 9 Will. 3, c. 7 (1 P. Will. 74). . . .

It is objected to this doctrine, that Lord Mansfield, in considering what species of property a mortgagee has in the estate mortgaged, lately said (2 Burr. 978, 979), that "a mortgage is a charge upon the land, and whatever would give the money, will carry the estate in the land along with it, to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to executors; it will pass by a will not made and executed with the solemnities required by the statute of frauds. The assignment of the debt, or forgiving it, will draw the land after it, as a consequence, nay, it would do it though the debt were forgiven only by parole; for the right to the land would follow, notwithstanding the statute of frauds" (3 Cha. Rep. 3).

¹ *The King v. St. Michaels*, Doug. 630; *The King v. Edington*, 1 East, 288; *Jackson v. Willard*, 4 Johns. 41; *Runyan v. Mersereau*, 11 *ibid.* 534; *Huntington v. Smith*, 4 Conn. 235; *Willington v. Gale*, 7 Mass. 138; *M'Call v. Lennox*, 9 Serg. & Rawle, 302; *Ford v. Philpot*, 5 Harr. & Johns. 312; *Wilson v. Troup*, 2 Cowen, 195; *Eaton v. Whiting*, 3 Pick. 484; *Blaney v. Bearce*, 2 Greenl. 132. The growth and consolidation of the American doctrine, that until foreclosure the mortgagor remains seised of the freehold, and that the mortgagee has, in effect, but a chattel in-

terest, and that it goes to the executor, as personal assets, and though, technically speaking, the fee descends to the heir, yet he is but a trustee for the personal representatives, and need not be a party to a bill by the executor for a foreclosure, was fully shown and ably illustrated by the Chief-Justice of Connecticut, in *Clark v. Beach*, 6 Conn. 142, and by the Chief-Justice of Maine, in *Wilkins v. French*, 20 Maine, 111; and by the Chancellor of New Jersey, in *Kinna v. Smith*, 2 Green, 14; and these general principles were not questioned by the courts.—*Kent*.

Upon this authority it is said that the mortgagee has no legal estate in the land; that all mortgages are personal estate; and if the land is not redeemed nor redeemable, the judge of probate has a right to assign to the widow, where there are children, a third, and where there are none, half the land, to hold, not during life, but forever, in fee. . . .

In order the better to settle the authority of these propositions, said to have fallen from Lord Mansfield, it may not be amiss, first to consider the third proposition, viz.: "that the estate in the land is the same thing as the money due upon it;" as it may serve to illustrate the rest, and show what is intended to be implied in some or all of them.

If the mortgagee's estate in the land is the same thing as the money due upon it, then the money due upon the land is the mortgagee's estate in it; and consequently there is no difference between the mortgage of land for a term only, and a mortgage of it in fee, if it be for the same sum; the money, which is the estate in the land, being exactly the same in both cases; and the mortgagee in fee has no other nor greater estate in the land than the mortgagee of a term only hath. This proposition, if true, when taken according to the words of it, without restriction or limitation, at once destroys the distinction between the *vadium vivum* and the *vadium mortuum*. It renders idle the invention and substitution of mortgages for a term instead of mortgages in fee, and tends to prove that the mortgagee has no estate, according to the legal sense of words, in the land. But surely Lord Mansfield did not so understand the proposition; for in that which immediately precedes it, he plainly distinguishes between the money and the estate in the land, and so he doth in those which follow. In the same case he just before says, that if it appeared that the testator really meant and intended to devise the close as land, it would be a devise of the land, the mortgage being forfeited by law, and the estate in the land having become absolute. What, was the money become absolute? No, surely. His lordship meant, that the conditional fee simple which the mortgagee had in the close by the non-payment of the money by the day, had become an absolute fee simple in law; so that he might devise the land to his son and daughter in fee tail; and if that was his intent in the will, the close would pass accordingly, as an estate of inheritance in fee tail so long as it continued, which would be until it was redeemed, or the estate tail was spent, agreeably to what Lord Keeper Wright said in *Gilb. Eq. Ca. 3*, in the case of a mortgage in fee.

The money due on the mortgage could not, by Lord Mansfield, be considered as the estate in the land, so as to make the money real estate, nor the estate in the land money, so as to make an estate in fee in land or the land itself personal estate. His lordship doubtless well knew there was a difference between a mortgage of land for a term only and a mortgage in fee: That the former was but a chattel and the latter an estate of inheritance; that the former, unless dependent upon the inheritance, was *legal* assets, and the latter *equitable* assets only; that the former went directly to the executor, &c., but the latter descended to the heir, and the executor could not have the land without the aid of the Court of Chancery. And yet the several propositions, as they stand, confound mortgages for a term and mortgages in fee together; as though there was no difference between them, which is not reasonable to suppose Lord Mansfield ever did; and, therefore, it must be supposed the reporter did not take down the restrictions, with which his lordship qualified his propositions, and left them to be implied by the reader. . . .

For if the mortgagor in fee shall, after the day of payment is elapsed, pay the mortgage money to the mortgagee, it doth not revert the fee in him in law, nor even in equity; because the mortgagee is deemed in such a case by the Court of Chancery a trustee of the mortgagor, &c., until the estate is reconveyed; and so is a vendor after a contract to convey, and the land, though not conveyed, will in equity pass by the will of the vendee as his land (3 Chan. Rep. 3). And surely, forgiving the debt will not vest the estate in the mortgagor, more than payment of the mortgage money. Nay, where mortgages are devised to executors, upon payment of the money to them, the heir is decreed to join in the reconveyance. . . .

Upon the whole the futility of the allegations, "that mortgages are personal estate, that a mortgagee has no estate in the land, and that the land mortgaged, even after it has become irredeemable, may be distributed by the judge of probate as personal estate," is evident. . . .

Authorities showing the estate, both legal and equitable, to be in the mortgagee: 2 Atk. 352-4; 2 Cha. Ca. 97; 1 Cha. Ca. 285.¹

¹ "If the estate on which a pauper resides is substantially his property, that is sufficient whatever forms of conveyance there may be; and therefore a mortgagor in possession gains a settlement, because the mortgagee, notwithstanding the form, has but

a chattel, and the mortgage is only a security. It is an affront to common-sense to say the mortgagor is not the real owner. . . ."

—Per LORD MANSFIELD, in *The King v. St. Michaels*, Doug. 632 (1781).

(c) *The Equitable Mortgage*

BURGH v. FRANCIS

COURT OF CHANCERY, 1673

(Rep. temp. Finch, 28)

This bill was brought by the executors of the mortgagee against the heir of the mortgagor, to perfect a defective deed of mortgage by feoffment, without livery and seisin, and to be relieved against certain judgments confessed by the defendant Henry Francis, and by Sherrer and his wife, by collusion to defeat the plaintiffs.

The defendants acknowledge by their answers, that they had confessed several judgments all in one term, and most of them at the same time, and to several persons for considerable sums of money, which they set forth, but deny they were since the bill exhibited, tho' they cannot tell when the warrants of attorney were sealed.

This cause being heard by the LORD KEEPER BRIDGMAN, he directed the matter to be examined before a master, and more particularly whether the bill was a new or an amended bill, and when the judgments were obtained, and when the warrants of attorney were dated and sealed, and whether the judgments were confessed after the bill, and after notice of the mortgage; and after the master had made his report, he would give his opinion, &c.; the cause was reheard by the LORD SHAFTSBURY, and an accommodation proposed, which took no effect, and being now reheard by the LORD KEEPER FINCH, he decreed that the plaintiffs should be relieved, and that the several judgments ought not to incumber the mortgaged premises, until the mortgage money was all paid.

This decree was not founded on the manner of obtaining these judgments, nor on the special way by which they were endeavored to charge the lands, viz., by pleading that the heir had nothing by descent besides the lands in mortgage, nor upon the priority of the *teste* of the subpoena, which was before the *teste* of the originals upon which the judgments were had, but it was founded on the nature of the case.

For the debt due upon this mortgage did originally charge the land which the debts by bond did not, till they were reduced into judgments; and altho' the mortgage was defective in point of law for want of livery, yet equity, which supplies that defect, did still charge the land, and it ought not to be in the power of the

heir at law to charge it, by acknowledging judgments in prejudice to such equity; the rather, because in this cause it appeared, that the mortgagor had covenanted for him and his heirs, to make any farther assurance; so that when the land descends upon the heir charged with this mortgage, he is in nature of a trustee for the mortgagee till the money is paid, and cannot incumber it; and tho' the creditors had not any notice of this mortgage, yet they shall be bound in this case, because they are not put in a worse condition than they ought to be, viz., to be postponed to the mortgage; and it appeared in proof, that the heir once offered to pay the mortgage money, but upon sight of the defect of the deed he refused, and presently acknowledged all those judgments on bonds, on purpose to load the land with incumbrances, and in effect to pay his father's debts with the money due on the mortgage.

Wherefore the decree was, that the defendant Henry Francis, who was to be heir at law, shall convey to the plaintiffs, or to such whom he shall appoint, a sufficient and perfect estate of inheritance in the premises, in such manner as the master shall direct, subject to be redeemed upon the payment of the principal and interest due on the former defective deed, and the said lands shall be held as mortgaged, and be quietly enjoyed against the defendants, and all claiming under them since the date of the former mortgage; and that he, to whom the redemption doth belong, may exhibit his bill in convenient time, or in default thereof the plaintiff may exhibit his bill to foreclose.

And a perpetual injunction was awarded to quiet the plaintiff's possession against all the said defendants, and to stay all proceedings at law, but no costs until redemption, or the plaintiff enforced to exhibit his bill to foreclose, and then costs to be allowed as in such cases.

SIR SIMEON STEWART'S CASE

COURT OF CHANCERY

(2 Sch. & Lef. 381)

The late Sir Simeon Stewart being embarrassed in his affairs, made a conveyance to the late Lord Delaware, Sir H. Tichborne, and others, in trust, for the payment of his debts. Previous to executing that conveyance, a gentleman of the name of Willis had been prevailed on by Sir Simeon Stewart to lend him a large sum of money; and Sir Simeon wrote him a letter, in which he stated

that he would make a mortgage to him on some part of his Hampshire estate;¹ and the question was, whether that was a contract which bound the trustees, who were trustees for general creditors. The creditors insisted they were purchasers for valuable consideration, without notice of this contract. The fact of notice could not be brought home to the creditors; but it was sufficiently established that the persons who prepared the trust deeds, and were therefore the agents of the creditors and the trustees in that transaction, had full notice: and therefore the only question was, whether this bound the estate in the hands of the trustees, as being an equity affecting Sir Simeon Stewart, prior to his conveyance; for if it bound him, the consequence would be that it bound his trustees, under the circumstances of that deed. The Court did determine that the letter was sufficient to bind him.—*Per* Redesdale, L. Ch., in *Card v. Jaffray*, 2 Sch. & Lef. 374 (1805).²

¹ In *Payne v. Wilson*, 74 N. Y. 348 (1878), held, an agreement to give a mortgage on one of several houses then being erected, without pointing out the particular house, created an equitable mortgage, "though indefinite to some degree;" citing the principal case. See, also, *Johnson v. Johnson*, 40 Md. 189 (1874).

² "The doctrine seems to be well established that an agreement in writing to give a mortgage, or a mortgage defectively executed, or an imperfect attempt to create a mortgage, or to appropriate specific property to the discharge of a particular debt, will create a mortgage in equity, or a specific lien on the property so intended to be mortgaged (1 Am. Lead. Cas. in Eq. 510; *Howe's Case*, 1 Paige, 125). The maxim of equity upon which this doctrine rests is, that equity looks upon things agreed to be done as actually performed; the true meaning of which is that

equity will treat the subject-matter as to collateral consequences and incidents in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been (Story, Eq. Jur., secs. 64 and 790; Will. Eq. Jur. 289, 299)."—*Per* CURRY, Ch. J., in *Daggett v. Rankin*, 31 Cal. 321 (1866).

See also, *Fullerton v. Provincial Bank of Ireland*, L. R. [1903] A. C. 309, as to the nature of equitable mortgages.

In *Bridgeport Ice Co. v. Meader*, 72 Fed. 115 (1895), the United States Circuit Court of Appeals said: "It is well settled that an agreement to give a mortgage, for a valuable consideration, upon property which is sufficiently specified, is in a court of equity regarded as the creation of the mortgage itself. This is held, for the reason that equity will treat that as done which ought to be done."

BOOK II
ESSENTIAL ELEMENTS OF MORTGAGE

CHAPTER I
CONVEYANCE

SECTION I.—MORTGAGE, PLEDGE AND LIEN

FRANKLIN *v.* NEATE
COURT OF EXCHEQUER, 1844
(13 *M. & W.* 481)

This was an action of trover for a chronometer; to which the defendant pleaded, first, not guilty; secondly, that the plaintiff was not possessed of the chattel.

At the trial, before *Parke, B.*, at the Middlesex sittings in last Trinity Term, it appeared that the chronometer for which the action was brought had been pledged, by a person named Gilbert, to the defendant, a pawnbroker, under a written agreement that it was deposited as a collateral security for the sum of £15, and interest; and that, in case Gilbert should not redeem it before twelve months, the defendant should be authorized to sell it, and repay himself principal and interest. The plaintiff afterward bought the chronometer from Gilbert, whilst it was in the defendant's hands, after the expiration of the year; he then tendered to the defendant the amount due, and demanded possession of it, and on the defendant's refusing to deliver it, brought the present action. It was contended for the defendant, that no property passed to the plaintiff by the sale; that it was merely an assignment of a right of action, with an equity of redemption; and the learned Judge, being of that opinion, directed the jury to find their verdict in favor of the defendant; giving leave to the plaintiff to move to enter a verdict for him for the sum of £19 10s.

ROLFE, B. This was an action of trover for a chronometer. It appeared on the trial that the chronometer in question had been

pawned by the owner with the defendant, and at the time of the pawn, the owner delivered to the defendant a written paper, authorizing him to sell if the chronometer was not redeemed within a year. The owner afterward sold it to the plaintiff, subject to the defendant's right as pawnee. The plaintiff, then, after the year had expired, tendered to the defendant the amount due on the pawn, but the defendant denied the plaintiff's right to redeem, and refused to deliver up the chronometer, and, therefore, the plaintiff brought this action. On this state of facts, the verdict on the issue on the plea denying the plaintiff's possession, was by the direction of my brother Parke, who tried the cause, taken for the defendant, with liberty, nevertheless, for the plaintiff to move to enter a verdict for him, with £19 10s. damages, in case the Court should be of opinion that he had proved the issue. The learned Judge was inclined to think that this was not the case of a simple pawn, but that the terms on which the chronometer was pledged were such as to give the defendant something more than the right of a pawnee, and operated as a mortgage. If he was a mortgagee, and the absolute property was transferred to him, defeasible upon repayment of the money advanced, the assignee of the right of redemption, which only remained in the original owner, could have maintained no action of trover after tendering the money; but, considering the terms of the instrument which accompanied the deposit, we all agree in thinking, that, though they gave more than the ordinary right of a pawnee, viz., the right to sell, which, being part of the security for the advance, was irrevocable by the pledgor or his assignee, they did not constitute a mortgage or transfer of the entire legal property in the chattel itself. The case, therefore, stands on the same footing, as far as relates to the right of the pawnor, with an ordinary pledge.

A rule *nisi* having been granted, pursuant to the leave reserved, Mr. Petersdorff, for the defendant, showed cause, and contended that the verdict was right, on the ground that a pawnor cannot transfer to another such a right of possession as enables him to bring an action of trover. There is very little to be found in the books on the subject of the right of a pawnor over the chattel pawned; but this is very clear, that, notwithstanding the pawn, the pawnor still retains a qualified property; and, in the absence of direct authority on the point, this seems to us decisive in favor of his right to sell, and by the sale to transfer to the purchaser his qualified property in the goods pawned, together with all the rights incident thereto. The case was argued for the defendant, as if

what this pawnor transferred, or sought to transfer, was a mere right of action. But this is not so; he transfers the property in the chattel, qualified, indeed, by the right existing in the pawnee, but still a right of property, and the right of action afterwards exists in the purchaser, not in consequence of its having been transferred to him by the original pawnor, but by reason of the pawnee having wrongfully converted to his own use that which by the sale became the property of the purchaser.

We do not feel at all pressed by the argument *ab inconvenienti*, urged by Mr. Petersdorff. "If several chattels," he asked, "should be pawned for one sum, could separate sales be made of each to different purchasers?" We answer, undoubtedly they may; the pawnee will, of course, not be bound to part with any of the chattels until his whole debt is paid; but, subject to the claim of the pawnee, the pawnor has the same right over each chattel separately which he had before the pawn was made. Again, it is said, suppose the chattel is injured by default of the pawnee, while in his custody, who was to sue the pawnee, the original pawnor or the purchaser? The answer is obvious. The person with whom the contract is made, that is, the original depositor, is the proper plaintiff, if the action be for a breach of contract express or implied, unless a new one be made with the purchaser; the owner for the time being is the proper plaintiff, if the injury be by the destruction or conversion of the chattel; just as, in the case of a carrier, the original employer is the person to sue for the loss for negligent carriage, or other breach of contract—the other subsequent purchaser for the conversion after the purchase.

That in ordinary cases of bailment, not by way of pawn, the bailor may sell, is a proposition admitting of no doubt; indeed, it is assumed to be law by Lord Holt, in one of the cases relied on by Mr. Petersdorff (*Rich v. Aldred*, 6 Mod. 216), where he says: "If A. bails goods to C., and after gives his whole right in them to B., B. cannot maintain detinue for them against C. because the special property that C. acquires by the bailment was not thereby transferred to B.;" and there does not seem to be any solid ground of distinction, in this respect, between a bailment by way of pawn and any other bailment.

With so little then of direct authority, we must act on the general principle, that a pawnor, like every other bailor, retains his property in the goods pawned, subject only to the qualified property transferred to the pawnee; that as an incident to such property, he has the right of sale, and that after the sale the purchaser

has the same interest in the chattel which the pawnor had. The rule must, therefore, be made absolute.¹

¹ "It appears to me that considerable confusion has been introduced into this subject by the somewhat indiscriminate use of the words 'special property,' as alike applicable to the right of personal retention in case of a lien and the actual interest in the goods created by contract of pledge to secure the payment of money. In *Legg v. Evans*, 6 M. & W. 42, the nature of a lien is defined to be a 'personal right which cannot be parted with;' but 'the contract of pledge carries an implication that the security shall be made effectual to discharge the obligation.' Story on Bailments, § 311. In each case *the general property remains in the pawnor*; but the question is as to the nature and extent of the interest, or special property, passing to the bailee, in the two cases. Mr. Justice Story, in his treatise on Bailments, § 324, thus describes the right and interest of the pawnee: 'He may by the common law deliver over the pawn into the hands of a stranger for safe custody, without consideration, or he may sell or assign all his interest in the pawn, or he may convey the same interest, conditionally, by way of pawn to another person, without in either case destroying or invalidating his security; but if the pawnee should undertake to pledge the property (not being negotiable securities) for a debt beyond his own, or to make a transfer thereof to his own creditor as if he were the absolute owner, it is clear that in such a case he would be guilty of a breach of trust, and his creditor would acquire no title beyond that held by the pawnee. The only question is, whether the creditor should be entitled to retain the pledge until the original debt was discharged, or

whether the owner might recover the pledge in the same manner as in the case of a naked tort, without any qualified right in the first pawnee.' . . .

"There would therefore appear to be some real difference in the incidents between a simple lien, like that in *Legg v. Evans*, 6 M. & W. 36, and the lien of a broker or factor before the Factor's Act, and the case of a deposit by way of pledge to secure the repayment of money, which latter more nearly resembles an ordinary mortgage, except that the pawnor retains the general property in the goods pledged which the mortgagor does not in the case of an ordinary mortgage. Notes to *Coggs v. Bernard*, 1 Smith's L. C. 194 (5th ed.). A lien, as we have seen, gives only a personal right to retain possession. A factor's or broker's lien was apparently attended with the additional incident that to the extent of his lien he might transfer even the possession of the subject-matter of the lien to a third person, 'appointing him as his servant to keep possession for him.' In a contract of pledge for securing the payment of money, we have seen that the pawnee may sell and transfer the thing pledged on condition broken; but what implied condition is there that the pledgee shall not in the meantime part with the possession thereof to the extent of his interest? It may be that upon a deposit by way of pledge the express contract between the parties may operate so as to make a parting with the possession, even to the extent of his interest, before condition broken, so essential a violation of it as to revert the right of possession in the pawnor; but in the absence of such terms,

BROWN v. BEMENT

SUPREME COURT OF NEW YORK, 1811

(8 Johns. 75)

This was an action of trover, for three horses and a chair. The cause was tried at the Columbia Circuit, in September, 1810, before Mr. Justice Thompson.

The plaintiff proved that he was possessed of the horses and chair, and that, afterward, on the 26th of April, 1810, he tendered the sum of 283 dollars and 5 cents to Bement, one of the defendants, and demanded the horses and chair, who refused to deliver them, and referred the plaintiff to Strong, the other defendant. The plaintiff on the next day, made a tender of the same sum to Strong, and demanded the property, but Strong refused, saying the horses and chair were in possession of Bement. The defendants then produced in evidence an absolute bill of sale of the horses and chair to the defendants, under the hand and seal of the plaintiff, dated 27th October, 1809, for the consideration of 210 dollars and 35 cents. And the plaintiff gave in evidence a writing bearing the same date, executed by the defendants, by which they stipulated, on the payment of 210 dollars and 35 cents to them, by the plaintiff, in 14 days from the date, to deliver to the plaintiff the horses and the chair; but if the property was lost in the meantime, they were not to be responsible; nor for any expenses attending the property during the time.

It was proved, that before the commencement of the suit, Bement had told the plaintiff he was willing to return the property which remained, but that one of the horses had been sold. The

why are they to be implied? There may possibly be cases in which the very nature of the thing deposited might induce a jury to believe and find that it was deposited on the understanding that the possession should not be parted with; but in the case before us we have only to deal with the agreement which is stated in the plea. The object of the deposit is to secure the repayment of a loan, and the effect is to create an interest and a right of property in the pawnee, to the extent of the loan,

in the goods deposited; but what is the authority for saying that until condition broken the pawnee has only a personal right to retain the goods in his own possession?"—*Per MELLOR, J.*, in *Donald v. Suckling*, 1 Q. B. 585 (1866).

See article, "The True Nature of a Pawnee's Interest in Goods Pawned," by T. Cyprian Williams, 31 Law Quart. Rev. 75-83 (Jan., 1915). See also, *Attenborough v. Solomon*, [1913] A. C. 76.

plaintiff answered, that if they could agree as to the price of the horse sold, that would create no difficulty. A verdict was found for the plaintiff, by consent, subject to the opinion of the Court; and it was agreed that if the plaintiff was entitled to recover the whole property, the verdict should be entered for 438 dollars; but if for the one horse only which had been sold, then the verdict was to be for 85 dollars; and if the Court should be of opinion that the plaintiff was not entitled to recover at all, then a judgment of nonsuit was to be entered.

Three points were raised for the consideration of the Court:

1. That the writing given by the defendants to the plaintiff made the property a pledge, redeemable at any time.

2. That on tender of the money, the plaintiff's right of action was complete.

3. That the plaintiff was entitled, at least, to recover the value of the horse sold.

Per Curiam. The plaintiff has not shown a right of action. Here was a complete transfer of the title to the goods in question, with a condition of defeasance, on the payment of 210 dollars and 35 cents, in 14 days. This was a mortgage, not a technical pledge; and all that was said in the case of *Cortelyou v. Lansing* (2 Caines's Cases in Error, 200) respecting the nature and redeemableness of pledges, has no application to the case. The distinction between a pledge and a mortgage of goods was recognized by this court in *Barrow v. Paxton* (5 Johns. Rep. 258). A mortgage of goods is a pledge and more: for it is an absolute pledge to become an absolute interest, if not redeemed at the specified time. After the condition forfeited, the mortgagee has an absolute interest in the thing mortgaged; whereas the pawnee has but a special property in the goods to detain them for his security (2 Ves. Jun. 378; 1 Powell on Mort. 3). The title of the defendants here became absolute after the 14 days; and though it does not appear whether one of the horses was sold after or before the expiration of the time to redeem, that omission is not material, as no attempt was made, in season, to redeem.

Judgment of nonsuit must, therefore, be entered according to the stipulation in the case.

CONARD v. ATLANTIC INSURANCE Co., 1 Peters, 386 (1828). Action of trespass *de bonis asportatis* brought in the Circuit Court of the United States for the District of Pennsylvania, by the

Atlantic Insurance Company to recover against the defendant, John Conard, the Marshal of that district, the value of certain teas shipped on board the ships Addison and Superior, and levied upon by him, upon an execution in favor of the United States against one Edward Thompson, as the property of the latter. . . . The cargoes had previously been transferred by Thompson to the Insurance Co. by assignment of the bills of lading to secure the payment of a *respondentia* bond. It was held that this constituted a mortgage. The defendant contended that the statutory priority of the United States (Stat. 1799, c. 128, § 65) extended to this case. The Supreme Court overruled the claim in an opinion by Mr. Justice Story, from which the following is taken (440):

"Then, again, it is contended on behalf of the United States, that the priority thus created by law, if it be not of itself a lien, is yet superior to any lien, and even to an actual mortgage, on the personal property of the debtor."

It is admitted that where any absolute conveyance is made, the property passes so as to defeat the priority; but it is said that a lien has been decided to have no such effect, and that in the eye of a Court of Equity a mortgage is but a lien for a debt. *Thelluson v. Smith*, 2 Wheat. 396, has been mainly relied on in support of this doctrine. That case has been greatly misunderstood at the bar, and will require a particular explanation. But the language of the learned Judge who delivered the opinion of the Court in that case is conclusive on the point of a mortgage. "The United States," said he, "are to be first satisfied; but then it must be out of the debtor's estate. If, therefore, before the right of preference has accrued to the United States, the debtor has made a *bona fide* conveyance of his estate to a third person, or has mortgaged the same to secure a debt; or if his property has been seized under a *fiery facias*, the property is divested out of the debtor and cannot be made liable to the United States." The same doctrine may be deduced from the case of the *United States v. Fisher*, 2 Cranch, 358, where the Court declared that "no *bona fide* transfer of property in the ordinary course of business is overreached by the statutes," and "that a mortgage is a conveyance of property, and passes it conditionally to the mortgagee." If so plain a proposition required any authority to support it, it is clearly maintained in *United States v. Hooe*, 3 Cranch, 73.

It is true, that in discussions in Courts of Equity, a mortgage is sometimes called a lien for debt. And so it certainly is, and something more; it is a transfer of the property itself, as security for

the debt. This must be admitted to be true at law, and it is equally true in equity, for in this respect equity follows the law. It does not consider the estate of the mortgagee as defeated and reduced to a mere lien, but it treats it as a trust estate, and according to the intention of the parties, as a qualified estate and security. When the debt is discharged, there is a resulting trust for the mortgagor. It is, therefore, only in a loose and general sense that it is sometimes called a lien, and then only by way of contrast to an estate absolute and indefeasible.¹

Ex parte FOSTER, 2 Story, 131, 142 (1842). "But it is said that an attachment under our law constitutes a lien upon the property attached; that it is a perfect, fixed and vested lien, as much so as a lien by a mortgage upon personal estate; that it gives a vested interest in the real estate attached, so that the creditor may dispute the validity of a will thereof, and that it is deemed equivalent to a title by purchase for a valuable consideration. And certain authorities are relied on to establish and confirm these positions. . . .

"It is true, as asserted at the bar, that an attachment upon mesne process is constantly spoken of in our Reports as a lien, and doubtless it is so in a very general sense of the term, adopted by way of analogy and illustration, rather than from a very exact resemblance which it bears to liens, generally recognized as such at the common law, or in equity, or in maritime jurisprudence. But, as has been truly said by Lord Coke, no simile holds in everything. *Nullum simile quatuor pedibus currit*. Lord Tenterden has said that the word lien, in its proper sense, in the law of England, imports that the party is in possession of the thing that he claims to detain, and that where there is no possession, actual or constructive, there can be no lien. And this is generally true, perhaps universally true at the common law, independently of statutory provisions, or of special contract. The doctrine was explicitly asserted by Mr. Justice Buller in delivering his opinion in the great case of *Lickbarrow v. Mason*, before the House of Lords (6 East. R. 21, note; *id.* 25), where he says: 'Liens exist at law only in cases where the party entitled to them has the possession of the goods, and if he once part with the possession after the lien attaches, the lien is gone.' . . .

"In equity, also, liens exist independent of possession, either

¹ Later cases seem to declare that a lien also will not be overridden. *Thomas Scattergood*, Fed. Cas. No. 11,106 (1828).

actual or constructive; as, for example, the lien of a vendor on the land for the unpaid purchase money. But it has been the long established doctrine, in equity, that a lien is not, in strictness, either a *jus in re*, or a *jus ad rem*; that is, it is not a property in the thing itself, nor does it constitute a right of action for the thing. It more properly constitutes a charge upon the thing. It is, therefore, at most, a simple right to possess and retain property until some charge attaching to it is paid or discharged; or a mere right to maintain a suit *in rem* to enforce payment of the charge. Mr. Justice Buller, speaking of liens at the common law, is equally expressive. He says: 'Liens are not founded on property, but they necessarily suppose the property to be in some other person, and not in him who sets up the right. They are qualified rights.'

"Now, an attachment does not come up to the exact definition or meaning of a lien, either in the general sense of the common law, or in that of the maritime law, or in that of equity jurisprudence. Not in that of the common law, because the creditor is not in possession of the property; but it is in *custodia legis*, if personal property; if real property, it is not a fixed and vested charge, but it is a contingent, conditional charge, until the judgment and levy. Not in the sense of the maritime law, which does not recognize or enforce any claim as a lien, until it has become absolute, fixed and vested. Not in that of equity jurisprudence, for there a lien is not a *jus in re* or a *jus ad rem*. It is but a charge upon the thing, and then only when it has, in like manner, become absolute, fixed and vested. . . ."—*Per Story, J.*

CHAPTER I (*Continued*)

SECTION II. AFTER-ACQUIRED PROPERTY

PERKINS, LAWS OF ENGLAND (about 1550). *Grants.* § 65. Now is to shew of things to be granted or charged: And as to that *know*, that it is a common learning in the law, that a man cannot grant or charge that which he hath not: And therefore, if a man grant a rent charge out of the Manour of Dale, and in truth he hath not anything in the Manour of Dale, and after he purchase the Manour of Dale, yet he shall hold it discharged.

HOLROYD *v.* MARSHALL

HOUSE OF LORDS, 1861

(10 *H. L. C.* 191)

James Taylor carried on the business of a damask manufacturer at Hayes Mill, Ovenden, near Halifax, in the county of York. In 1858 he became embarrassed, a sale of his effects by auction took place, and the Holroyds, who had previously employed him in the way of his business, purchased all the machinery at the mill. The machinery was not removed, and it was agreed that Taylor should buy it back for 5000*l.* An indenture, dated the 20th September, 1858, was executed, to which A. P. and W. Holroyd were parties of the first part, James Taylor of the second part, and Isaac Brunt of the third part. This indenture declared the "machinery, implements, and things specified in the schedule hereunder written and fixed in the said mill," to belong to the Holroyds; that Taylor had agreed to purchase the same for 5000*l.*, but could not then pay the purchase money, wherefore it was agreed, &c., that "all the machinery, implements, and things specified in the schedule (hereinafter designated 'the said premises')" were assigned to Brunt, in trust for Taylor, until a certain demand for payment should be made upon him, and then, in case he should pay to the Holroyds a sum of 5000*l.*, with interest, for him absolutely. If default in payment was made, Brunt was to have power to sell, and

hold the moneys, in pursuance of the trust for sale, upon trust, to pay off the Holroyds, and to pay the surplus, if any, to Taylor. The indenture, in addition to a clause binding Taylor, during the continuance of the trust, to insure to the extent of 5000*l.* contained the following covenant: "That all machinery, implements, and things which, during the continuance of this security, shall be fixed or placed in or about the said mill, buildings, and appurtenances, in addition to or substitution for the said premises, or any part thereof, shall, during such continuance as aforesaid, be subject to the trusts, powers, provisoes, and declarations hereinbefore declared and expressed concerning the said premises; and that the said James Taylor, his executors, &c., will at all times, during such continuance as aforesaid, at the request, &c., of the said Holroyds, their executors, &c. do all necessary acts for assuring such added or substituted machinery, implements, and things, so that the same may become vested accordingly." The deed was, four days afterwards, duly registered, as a bill of sale, under the 17 & 18 Vict. c. 36. Taylor, who remained in possession, sold and exchanged some of the old machinery, and introduced some new machinery, of which he rendered an account to the Holroyds before April, 1860; but no conveyance was made of this new machinery to them, nor was any act done by them, or on their behalf, to constitute a formal taking of possession of the added machinery. On the 2d April, 1860, the Holroyds served Taylor with a demand for payment of the 5000*l.* and interest, and no payment being made, they, on the 30th April, took possession of the machinery, and advertised it for sale by auction on the 21st May following.

On the 13th April, 1860, Emil Preller sued out a writ of *scire facias* against Taylor for the sum of 155*l.* 18*s.* 4*d.*, damages and costs, which was executed on the following day by James Davis, an officer of Mr. Garth Marshall, then high sheriff of York. On the 10th May, 1860, a similar writ, for 138*l.* 3*s.* 3*d.*, was executed by Davis, and on the 25th May, 1860, the property was sold by the sheriff. Notice was given to the sheriff of the bill of sale executed in favour of the Holroyds. The only part of the machinery claimed by the execution creditors consisted of those things which had been purchased by Taylor since the date of the bill of sale. The sheriff insisted on taking under the writs these added articles, and the Holroyds, on the 30th May, 1860, filed their bill against the sheriff, and the other necessary parties, praying for an assessment of damages and general relief. The cause was heard before Vice-Chancellor Stuart, who, on 27th July, 1860, made an order, declaring

that the whole machinery in the mill, including the added and substituted articles, at the time of the execution, vested in the plaintiffs by virtue of the bill of sale. On appeal, before Lord Chancellor Campbell, on the 22d December, 1860, the Vice-Chancellor's order was reversed. This present appeal was then brought.

THE LORD CHANCELLOR (LORD WESTBURY), after stating the facts of the case, said: My Lords, the question is, whether as to the machinery added and substituted since the date of the mortgage the title of the mortgagees, or that of the judgment creditor, ought to prevail. It is admitted that the judgment creditor has no title as to the machinery originally comprised in the bill of sale; but it is contended that the mortgagees had no specific estate or interest in the future machinery. It is also admitted that if the mortgagees had an equitable estate in the added machinery, the same could not be taken in execution by the judgment creditor.

The question may be easily decided by the application of a few elementary principles long settled in Courts of equity. In equity it is not necessary for the alienation of property that there should be a formal deed of conveyance. A contract for valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract is one of which a Court of equity will decree specific performance. In the language of Lord Hardwicke, the vendor becomes a trustee for the vendee; subject, of course, to the contract being one to be specifically performed. And this is true, not only of contracts relating to real estate, but also of contracts relating to personal property, provided that the latter are such as a Court of equity would direct to be specifically performed.

A contract for the sale of goods, as, for example, of five hundred chests of tea, is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell five hundred chests of the particular kind of tea which is now in my warehouse in Gloucester, is a contract relating to specific property, and which would be specifically performed. The buyer may maintain a suit in equity for the delivery of a specific chattel when it is the subject of a contract, and for an injunction (if necessary) to restrain the seller from delivering it to any other person.

The effect in equity of a mere contract as amounting to an alienation, may be illustrated by the law relating to the revocation of wills. If the owner of an estate devises it by will, and afterwards

contracts to sell it to a purchaser, but dies before the contract is performed, the will is revoked as to the beneficial or equitable interest in the estate, for the contract converted the testator into a trustee for the purchaser; and, in like manner, if the purchaser dies intestate before performance of the contract, the equitable estate descends to his heir at law, who may require the personal representative to pay the purchase money. But all this depends on the contract being such as a Court of equity would decree to be specifically performed.

There can be no doubt, therefore, that if the mortgage deed in the present case had contained nothing but the contract which is involved in the aforesaid covenant of Taylor, the mortgagor, such contract would have amounted to a valid assignment in equity of the whole of the machinery and chattels in question, supposing such machinery and effects to have been in existence and upon the mill at the time of the execution of the deed.

But it is alleged that this is not the effect of the contract, because it relates to machinery not existing at the time, but to be acquired and fixed and placed in the mill at a future time. It is quite true that a deed which professes to convey property which is not in existence at the time is as a conveyance void at law, simply because there is nothing to convey. So in equity a contract which engages to transfer property, which is not in existence, cannot operate as an immediate alienation merely because there is nothing to transfer.

But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained.

Apply these familiar principles to the present case; it follows that immediately on the new machinery and effects being fixed or placed in the mill, they became subject to the operation of the contract, and passed in equity to the mortgagees, to whom Taylor was bound to make a legal conveyance, and for whom he, in the meantime, was a trustee of the property in question.

There is another criterion to prove that the mortgagee acquired an estate or interest in the added machinery as soon as it was brought into the mill. If afterwards the mortgagor had attempted to remove any part of such machinery, except for the purpose of substitution, the mortgagee would have been entitled to an injunction to restrain such removal, and that because of his estate in the specific property. The result is, that the title of the appellants is to be preferred to that of the judgment creditor. . . .

I therefore advise your Lordships to reverse the order of Lord Chancellor Campbell, and direct the petition of rehearing presented to him to be dismissed, with costs.

LORD CHELMSFORD. The question in the case is, whether the appellants, who have an equitable title as mortgagees of certain machinery fixed and placed in a mill, of which the mortgagor, James Taylor, was tenant, are entitled to the property which was seized by the sheriff, under two writs of execution issued against the mortgagor, in priority to those executions, or either of them?

The title of the appellants depends upon a deed dated the 20th September, 1858. [His Lordship here stated the bill of sale and the other facts of the case—see *ante*.] The machinery sold by the sheriff was more than sufficient to satisfy the first execution, and the appellants claiming a preference over both executions, contend that the possession taken by them on the 30th April entitled them, at all events, to priority over the second execution of the 11th May. The great question, however, is, whether they are entitled to a preference over the first execution by the mere effect of their deed? or whether it was necessary that some act should have been done after the new machinery was fixed or placed in the mill, in order to complete the title of the appellants?

It was admitted that the right of the judgment creditor, who has no specific lien, but only a general security over his debtor's property, must be subject to all the equities which attach upon whatever property is taken under his execution. But it was said (and truly said) that those equities must be complete, and not in-

choate or imperfect, or, in other words, that they must be actual equitable estates, and not mere executory rights.

What, then, was the nature of the title which the mortgagees obtained under their mortgage deed? If the question had to be decided at law, there would be no difficulty. At law an assignment of a thing which has no existence, actual or potential, at the time of the execution of the deed, is altogether void (*Robinson v. Macdonnell*, 5 Maule & S. 228). But where future property is assigned, and after it comes into existence, possession is either delivered by the assignor, or is allowed by him to be taken by the assignee, in either case there would be the *novus actus interveniens* of the maxim of Lord Bacon, upon which Lord Campbell rested his decree,¹ and the property would pass.

It seemed to be supposed upon the first argument that an assignment of this kind would not be void in law if the deed contained a license or power to seize the after-acquired property. But this circumstance would make no difference in the case. The mere assignment is itself a sufficient *declaratio præcedens* in the words of the maxim; and although Chief Justice Tindal, in the case of *Lunn v. Thornton*, said, "It is not a question whether a deed might not have been so framed as to give the defendant a power of seizing the future personal goods," he must have meant, that under such a power the assignee might have taken possession, and so have done the act which was necessary to perfect his title at law. This will clearly appear from the case of *Congreve v. Evetts*, 10 Exch. 298, in which there was an assignment of growing crops and effects as a security for money lent, with a power for the assignee to seize and take possession of the crops and effects bargained and sold, and of all such crops and effects as might be substituted for them; and Baron Parke said, "If the authority given by the debtor by the bill of sale had not been executed, it would have been of no avail against the execution. It gave no legal title, nor even equitable title, to any specific goods; but when executed not fully or entirely, but only to the extent of taking possession of the growing crops, it is the same in our judgment as if the debtor himself had put the plaintiff in actual possession of those crops." And in *Hope v. Hayley*, 5 Ellis & B. 830, 845 (a case much relied upon by the Vice-Chancellor), where there was an agreement to transfer goods, to be afterwards acquired and substituted, with a power to take possession of all original and substituted goods,

¹ *Licet dispositio de interesse futuro sit inutilis, tamen fieri potest declaratio præcedens quæ sortiatur effectum, interveniente novo actu.*

Lord Campbell, Chief Justice, said, "The intention of the contracting parties was, that the present and future property should pass by the deed. That could not be carried into effect by a mere transfer; but the deed contained a license to the grantee to enter upon the property, and that license, when acted upon, took effect independently of the transfer."

I have thought it right to dwell a little upon these cases, both on account of some expressions which were used in argument respecting them, and also because in determining the present question it is useful to ascertain the precise limits of the doctrine as to the assignment of future property at law. The decree appealed against proceeds upon the ground, not indeed that an assignment of future property, without possession taken of it, would be void in equity (as the cases to which I have referred show that it would be at law), but that the equitable right is incomplete and imperfect unless there is subsequent possession, or some act equivalent to it to perfect the title.

In considering the case, it will be unnecessary to examine the authorities cited in argument, to show that if there is an agreement to transfer or to charge future acquired property, the property passes, or becomes liable to the charge in equity, where the question has arisen between the parties to the agreement themselves. In order to determine whether the equity which is created under agreements of this kind is a personal equity to be enforced by suit, or to be made available by some act to be done between the parties, or is in the nature of a trust attaching upon and binding the property at the instant of its coming into existence, we must look to cases where the rights of the third persons intervene. . . .

The judgment of Lord Campbell resting, as he states, upon Lord Bacon's maxim, determines that some subsequent act is necessary to enable "the equitable interest to prevail against a legal interest subsequently *bona fide* acquired." It is agreed that this maxim relates only to the acquisition of a legal title to future property. It can be extended to equitable rights and interests (if at all) merely by analogy; but in thus proposing to enlarge the sphere of the rule, it appears to me that sufficient attention has not been paid to the different effect and operation of agreements relating to future property at law and in equity. At law property, non-existing, but to be acquired at a future time, is not assignable; in equity it is so. At law (as we have seen), although a power is given in the deed of assignment to take possession of after-acquired

property, no interest is transferred, even as between the parties themselves, unless possession is actually taken; in equity it is not disputed that the moment the property comes into existence the agreement operates upon it.

[The noble and learned Lord then discusses the case of *Whitworth v. Gaugain*, 1 Phill. 728, and concludes as follows:]

Whatever doubts, therefore, may have been formerly entertained upon the subject, the right of priority of an equitable mortgagee over a judgment creditor, though without notice, may now be considered to be firmly established; and, according to the opinion of Lord St. Leonards, "any agreement binding property for valuable consideration" will confer a similar right.

But if it should still be thought that the deed, together with the act of bringing the machinery on the premises, were not sufficient to complete the mortgagee's title, it may be asked what more could have been done for this purpose. The trustee could not take possession of the new machinery, for that would have been contrary to the provisions of the deed under which Taylor was to remain in possession until default in payment of the mortgage money after a demand in writing, or until interest should have become in arrear for three months; and in either of these events a power of sale of the machinery might be exercised. And if the intervenient act to perfect the title in trust be one proceeding from the mortgagor, what stronger one could be done by him than the fixing and placing the new machinery in the mill, by which it became, to his knowledge, immediately subject to the operation of the deed?

I asked Mr. Amphlett, upon the second argument, what *novus actus* he contended to be necessary, and he replied "a new deed." But this would be inconsistent with the terms of the original deed, which embraces the substituted machinery, and which certainly was operative upon the future property as between the parties themselves. And it seems to be neither a convenient nor a reasonable view of the rights acquired under the deed, to hold that for any separate article brought upon the mill a new deed was necessary, not to transfer it to the mortgagee, but to protect it against the legal claims of third persons.

But if something was still requisite to be done, and that by the mortgagor, I cannot help thinking that the account delivered by Taylor to the mortgagees of the old machinery sold, and of the new machinery which was added and substituted, was a sufficient *novus*

actus interveniens, amounting to a declaration that Taylor held the new machinery upon the trusts of the deed.

LORD WENSLEYDALE. My noble and learned friend will forgive me, but that was not mentioned in the bill.

LORD CHELMSFORD. My noble and learned friend is quite correct in that; it must be taken that that was not mentioned in the bill, and that was the answer given when I urged, in the course of the argument, that that account must be taken to be a sufficient *actus*. But still I am stating what my views are of the whole of the case. I think that the account delivered by Taylor to the mortgagees of the whole machinery which was added and substituted, was a sufficient *novus actus interveniens*, amounting to a declaration that Taylor held the new machinery upon the trusts of the deed, the only act which could be done by him in conformity with it; and it is difficult to understand for what other reason such an account should have been rendered. As between themselves, it is quite clear that a new deed of the added and substituted machinery was unnecessary; no possession could be delivered of it, because it would have been inconsistent with the agreement of the parties; and anything, therefore, beyond this recognition of the mortgagee's right appears to be excluded by the nature of the transaction.

I will add a very few words on the subject of the notice of the claim of the mortgagees to the judgment creditor. I think that the equitable title would prevail even if the judgment creditor had no notice of it, according to the authorities which have been already observed upon. It is true that Lord Cottenham, in the case of *Metcalf v. The Archbishop of York*, 1 Mylne & C. 547, 555, said that if the plaintiff, in that case, was entitled to the charge upon the vicarage under the covenant and charge in the deed of 1811, "then, as the defendants had notice of that deed before they obtained their judgment, such charge must be preferred to that judgment." This appears to imply that his opinion was, that if the judgment creditor had not had notice, he would have been entitled to priority. Much stress, however, ought not to be laid upon an incidental observation of this kind, where notice had actually been given, and where, therefore, the case was deprived of any such argument in favor of the judgment creditor. If Lord Cottenham really meant to say that notice by the judgment creditor of the prior equitable title was necessary in order to render it available against him, his opinion is opposed to the decisions which have established that a judgment creditor, with or without notice,

must take the property, subject to every liability under which the debtor held it.

The present case, however, meets any possible difficulty upon the subject of notice, because it appears that the deed was registered as a bill of sale, under the provisions of the 17 & 18 Vict., c. 36. It was argued that this Act was intended to apply to bills of sale of actual existing property only, and it probably may be the case that sales of future property were not within the contemplation of the Legislature; but there is no ground for excluding them from the provisions of the Act; and upon the question of notice, the register would furnish the same information of the dealing with future as with existing property, which is all that is required to answer the objection.

I think that the late Lord Chancellor was right in holding that if actual possession of the machinery in question before the sheriff's officer entered was necessary, there was no proof of such possession having been taken on behalf of the mortgagee. But upon a careful consideration of the whole case, I am compelled to differ with him upon the ground on which he ultimately reversed Vice-Chancellor Stuart's decree. I think, therefore, that his decree should be reversed, and that of the Vice-Chancellor affirmed.¹

¹In *Tailby v. Official Receiver*, L. R. 13 A. C. 523 (1888), a manufacturer made an assignment for valuable consideration of all his stock in trade, fixtures, furniture and machinery in or about certain designated premises or any other place or places at which during the continuance of the security he might carry on business, "and also all book debts due and owing or which during the continuance of this security become due and owing to the said mortgagor." The objection was urged that an assignment of future book debts not limited to any specific business was too vague to have any effect since it was without any delimitation as to time, place or amount. The House of Lords held that this objection should be overruled, declaring that an individual may contract to assign all his future book

account and that this is neither too vague nor indefinite, citing the principal case.

See, also, *Illingworth v. Houldsworth* [1904], A. C. 355.

In *Ferguson v. Wilson*, 122 Mich. 97, 80 N. W. 1006 (1899), a chattel mortgage was given on certain designated property which also provided that it should cover "all other personal property which I may own or acquire during said years." The objection was urged that this clause would not embrace property afterwards acquired having no connection with the property owned by the mortgagor at the time of the giving of the mortgage. The court sustained this objection holding that, whatever might be the rule as between the parties themselves, the mortgage did not create a valid lien upon afterwards acquired property not connected with

MOODY v. WRIGHT

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1847

(13 *Metcalf*, 17)

This was a petition, under St. 1838, c. 163, § 18, for the interposition of the Court, as a court of chancery, in behalf of a creditor of two insolvent partners. The petitioner alleged that Horace Wright and Benjamin B. Hoxse, tanners, and partners in business, applied to the Judge of Probate for the County of Hampshire, in December, 1846, for the benefit of the insolvent laws, and that such proceedings were had, upon their application, that all their estate was assigned to the defendant, as assignee: That the petitioner, in July, 1839, sold and delivered to said Wright & Hoxse, hides, skins and bark, for the sum of \$2374.34, on credit, and took their promissory note therefor, payable in four months, with annual interest, and also took a mortgage of said property, and of other property, which mortgage was duly recorded, and by which they secured to the plaintiff whatever hides, skins, bark or stock, which might afterwards belong to them, wherever situated, and whether manufactured or not, and whether at market or not, or the proceeds of the same, if sold, and also all leather thereafter manufactured from the proceeds of the property then on hand, and in whatever shape it might afterwards exist, or whatever form it might assume, so that the then present and future earnings of the said Wright & Hoxse's tan works, both stock and proceeds, and whether sold or unsold, might stand conveyed, pledged and hypothecated to the petitioner, for the payment of said purchase money and note: That said note and mortgage had never been satisfied, discharged or cancelled, and that their validity had been repeatedly recognized and confirmed by said Wright & Hoxse, by the payment, and indorsement on the note, of the annual interest thereby secured: That the petitioner, at the first meeting of the creditors of said Wright & Hoxse, presented a petition to said judge of probate, setting forth the facts above mentioned, and also stating that the property intended to be secured by the mortgage aforesaid had been taken by the messenger, under the warrant issued according to the provisions of the insolvent laws, and praying that said property might be sold, and the proceeds thereof applied

the business in which the mortgagor was engaged at the time of giving the	mortgage, as against subsequent good-faith purchasers or attaching creditors.
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to the payment of said note, and that he might be admitted as a creditor for the residue, if any; referring to the schedules and return of the messenger for a description of the property to be sold; but that said judge of probate "did order and decree that the prayer of said petition should not be granted:" That a large amount of the property intended to be conveyed and hypothecated, as aforesaid, was taken by said messenger, and afterwards by the defendant, as assignee, in behalf of the general creditors of said Wright & Hoxse: That although, in the course of the business of said Wright & Hoxse, the identical property which was sold and delivered to them, as aforesaid, by the petitioner, was changed into other forms, yet the proceeds thereof were so used and invested as to assume the form of and become the property thus taken by said messenger and the defendant; that said property, thus taken and held by force of said mortgage, was a portion of the property and earnings of Wright & Hoxse's tan works, and was described in said mortgage, and therein pledged and hypothecated to the petitioner; and that said Wright and Hoxse continued their business as tanners until said warrant issued.

The petitioner's *prayer* was, that the property aforesaid, taken by the defendant, as assignee, or the proceeds thereof, might be applied towards the payment of said note, and that he might be admitted as a creditor, for the residue thereof, if any, according to the provisions of St. 1838, c. 163, § 3; and that such other order or decree might be made in the premises, as law and justice might require.

The *answer* of the respondent averred, that all the property belonging to the said Wright & Hoxse, at the date of said note and mortgage, was afterwards, from time to time, disposed of by them, at their pleasure, and that at no time between the date of said mortgage and the taking of their property by the defendant, as assignee, did they ever set apart to the petitioner any specific portion of their property, which might have been purchased, if any was so purchased, with the proceeds of the property included in said mortgage; nor did they ever account to the petitioner, specifically, for the proceeds of the same, or any part thereof; nor did they, in the purchase and acquisition of stock, or other property which might have belonged or come to them, after the date of said mortgage, make any distinction between such, if any, as was purchased or acquired with the specific proceeds of the property belonging to them when said mortgage was executed, and that which was the proper fruit of their own personal labor, money and income, or

which accrued to them from any other source than the sale of said hypothecated property. Wherefore the respondent prayed that the decree of the Judge of Probate might be affirmed.

DEWEY, J. The instrument offered in evidence by the petitioner, as the foundation of his claim, purports to convey to him certain articles of personal property, consisting of hides, skins and bark, all then in existence, and in possession of the grantors, and also whatever hides, skins, bark or stock, of whatever description, that may hereafter belong to the grantors, wherever situated, and whether manufactured or not, and at market or not, or the proceeds if sold; also, all leather thereafter manufactured from the proceeds of property then on hand, and in whatever shape the property might thereafter exist, or whatever form it might assume; so that the then present and future property and earnings of the tan works might stand conveyed, pledged and hypothecated to the petitioner.

This instrument, so far as it purports to mortgage the property of the mortgagors then in existence, and held by them, was in all respects a valid instrument; and if any such property now remains for it to operate upon, it will be effectual to pass the same to the petitioner. We understand, however, that the case shows no such property in the hands of the assignee, and that the specific property conveyed by the petitioner to Wright & Hoxse, and by them re-conveyed in mortgage to him, has no longer any existence, and that the only ground of sustaining this petition is that of a lien upon subsequently acquired property, which had no existence at the time of the execution of the mortgage, and which has no other connection with it, than that, to some extent, it may have been purchased with funds which were the proceeds of various sales from the tannery; first, of the articles purchased, and their proceeds applied to the purchase of new stock, which, when manufactured, was again sold, and its proceeds invested; and so from time to time. This instrument is clearly, therefore, an attempt to mortgage or hypothecate after acquired property. Can such security be made effectual by the making and recording of such instrument, without any further act of the parties, with no delivery by the mortgagor, and no act on the part of the mortgagee, taking possession or exercising any rights of property in the newly acquired articles, by virtue of the provisions in the mortgage as to property?

This subject has been recently before us, in the case of *Jones v. Richardson*, 10 Met. 481, involving the question as to the validity

of such a mortgage in a court of law. The subject was very maturely considered, and the Court were all clearly of opinion that such mortgage did not pass after acquired property. It was stated, in that case, as an elementary principle, that "a person cannot grant or mortgage property of which he is not possessed, and to which he has no title." All the qualification introduced was, that one may grant personal property of which he is potentially, though not actually, possessed, as in the case of the grant of all the wool that shall grow on the sheep he owns at the time of the grant, but not wool which shall grow on sheep which are not his, but which he may afterwards buy.

In our opinion these principles as to conveyance of property are equally sound and equally to be enforced, whether the question as to the right of property is raised in a court of law or of equity. The parties appear before us, each claiming the property by conveyance; the petitioner by the instrument already recited, and the defendant as assignee, holding by virtue of a deed from a master in chancery, for the benefit of all the creditors of Wright & Hoxse. Whether it would really be more equitable, in a case like the present, that the after acquired property should be holden by the one party or the other; whether the claims of the individual creditor would, in an equitable view, be more meritorious than those of the entire body of creditors, seeking a distribution *pro rata*, would depend, not so much on anything disclosed on the face of the mortgage, as upon a full knowledge of the entire course of business of the mortgagor, and the circumstances appertaining to the property which is now the subject of controversy, the mode of its acquisition, &c.

Supposing ourselves clothed with full equity powers, and treating this case as before us unembarrassed by any question as to our limited jurisdiction in chancery, we are not satisfied that the petitioner has shown any such title to this property as would authorize us to hold it to be subject to a lien for the note of Wright & Hoxse to the petitioner, as against creditors who have acquired a right to it before any act of the petitioner had taken place, reducing the property to his possession, or by asserting effectually any right under the prospective hypothecation, as by making a claim and taking possession under it, while in the possession of Wright & Hoxse. There are doubtless equitable liens which may be enforced in courts of equity, though not available in a court of law. Many such might be enumerated. That which nearest approaches the present case is that of an agreement to convey property, or

do some act, the performance of which has been casually postponed; and in dealing with the rights of the parties in such case, a court of equity will consider a thing done which was agreed to be done. That class of cases does not present, however, the difficulties that arise in the present case. The property which is the subject of the agreement, in the case supposed, was in existence, and the power to convey the same, or stipulate for a conveyance, existed.

The difficulty that presses in the present case is the want of any binding original contract, which *per se* could have force and effect to change the after acquired property, without some further act by the parties, after the property should have come into existence. Such act we deem to have been necessary to perfect the title of the petitioner, whether his rights of property in such after acquired articles are sought to be enforced in equity or at law. We are fully aware that a different view of this question was taken by Mr. Justice Story in the case of *Mitchell v. Winslow*, 2 Story, R. 630, and that the result to which he came differs from ours as to the effect to be given to such mortgages in a court of equity.¹ In relation to that case, it is supposed by the counsel for the petitioner, that it had, to some extent, the sanction of this Court, in the remarks of the judge who delivered the opinion in the case of *Jones v. Richardson*. But we apprehend that no such view was intended to be suggested. The case then before the Court was an action at law; and the obvious and quite sufficient answer to the case of *Mitchell v. Winslow* which was relied upon by the then plaintiffs, was "that was a case in equity," without entering upon the further inquiry whether we should, as a court of equity, in a case before us, come to the same result.

The result to which we have come, upon the present petition, may be stated in the following propositions: The petitioner cannot hold the property in controversy, as mortgaged property, because it was not in existence, and, therefore, not capable of being conveyed in mortgage, at the time when the mortgage was made. The instrument could not operate to pass the property as a pledge,

¹ "It seems to me a clear result of all the authorities that wherever the parties by their contract intended to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor or not, or, if personal property, whether it is then *in esse* or not, it attaches in equity as a lien

or charge upon the particular property as soon as the assignor or contractor acquires a title thereto, against the latter and all persons asserting a claim thereto under him, either voluntarily, or with notice, or in bankruptcy."—*Per* STORY, J., in *Mitchell v. Winslow*, 2 Story, 630, 644 (1843).

because the custody of the same was not taken and retained by the pledgee. The property cannot be held as charged with a lien, because a lien cannot be created by an executory agreement without being accompanied by possession or delivery of the property. A stipulation that future acquired property shall be holden as security for some present engagement, is an executory agreement, of such a character, that the creditor with whom it is made may, under it, take the property into his possession, when it comes into existence, and is the subject of transfer by his debtor, and hold it for his security; and whenever he does so take it into his possession, before any attachment has been made of the same, or any alienation thereof, such creditor, under his executory agreement, may hold the same; but, until such an act is done by him, he has no title to the same; and that, such act being done, and the possession thus acquired, the executory agreement of the debtor authorizing it, it will then become holden by virtue of a valid lien or pledge. The executory agreement of the owner, in such a case, is a continuing agreement, so that when the creditor does take possession under it, he acts lawfully under the agreement of one then having the disposing power, and this makes the lien good. If, however, before taking possession, or doing such acts as are necessary to give vitality to the mortgage, as to the subsequently acquired property, an attachment or assignment for the benefit of creditors takes place, the opportunity for completing the lien is lost, and the mortgage or pledge not being perfected, the property passes to the assignee, and must be held by him for the benefit of the creditors generally.

There was no act done by the petitioner and by Wright & Hoxse jointly, or by either of the parties, which was sufficient to give effect to the original mortgage, as to the after acquired property. The recording of the mortgage by the petitioner did not; for that was before such property was acquired. The annual payment of interest by Wright & Hoxse could have no such effect. It was neither actually nor symbolically accepting the transfer or conveyance of the articles after they were acquired by Wright & Hoxse.

In no way, that we perceive, can we give effect to this contract, so as to give the petitioner the lien, upon the after acquired property, that he seeks to establish.

*Petition dismissed with costs.*¹

¹ Followed, *Lou v. Pew*, 108 Mass. 347 (1871); *Chynoweth v. Tenney*, 10 Wis. 397 (1860). But see *Chase*

v. Denny, 130 Mass. 566 (1881). In *Federal Trust Company v. Bristol County Street Railway Co.*, 222 Mass.

SMITHURST v. EDMUNDS

COURT OF CHANCERY OF NEW JERSEY, 1862

(14 N. J. Eq. 408)

THE CHANCELLOR. The complainant, being the owner of the Columbia House hotel, at Cape Island, with its appurtenances, and of the furniture therein, and being in possession of the premises, by an indenture bearing date on the seventh of June, 1860, leased the real estate to James H. Laird, for the term of three years from the first of May, 1860, at the yearly rental of \$5000, payable in equal installments, on the fifteenth day of July and thirty-first day of August in each year, and sold and transferred to the lessee, the furniture and other household articles for the sum of \$5563.42. Laird, as the lessee, as a collateral security for the punctual payment of the rent, resold and retransferred to the lessor all of said

35 (1915), Rugg, C. J., said at pp. 45-46:

"As an abstract proposition, the ruling that the mortgage as supplemented did not cover personal property acquired after the date of the supplemental indenture in August, 1901, was correct. The mortgagee did not take possession of any of this property by virtue of the power conferred by the mortgage. By no written instrument executed subsequent to its purchase was it brought under the lien of the mortgage. Under the general principle of law well established in this Commonwealth such after acquired personal property did not become subject to the mortgage either at law, *Jones v. Richardson*, 10 Met. 481; *Low v. Pew*, 108 Mass. 347, or in equity, *Moody v. Wright*, 13 Met. 17; *Blanchard v. Cooke*, 144 Mass. 207; *Wasserman v. McDonnell*, 190 Mass. 326; *Schlatter v. Young*, 197 Mass. 36; *Harriman v. Woburn Electric Light Co.*, 163 Mass. 85. Doubtless the general rule in equity elsewhere is contrary to our own. See *Central*

Trust Co. v. Kneeland, 138 U. S. 414, 419; *Bear Lake Irrigation Co. v. Garland*, 164 U. S. 1, 15; *Augusta Trust Co. v. Federal Trust Co.*, 82 C. C. A. 309, 312; *People's Trust Co. v. Schenck*, 195 N. Y. 398. Whatever may be the rule in other jurisdictions, the law is too firmly settled in this Commonwealth to be uprooted by judicial decision."

In *Humphrey v. Tatman*, 198 U. S. 91 (1904), held, taking possession of after acquired property within four months of the filing of petition in bankruptcy, under a mortgage made in good faith prior to that period, is valid against the trustee in bankruptcy according to the law of Massachusetts,—the court deciding that the time of the intervening act was immaterial, provided that the original mortgage was given before the four months preceding the bankruptcy. This decision reversed the Supreme Judicial Court of Massachusetts, 184 Mass. 361 (1903). And see *Thompson v. Fairbanks*, 196 U. S. 516 (1904).

furniture and other household articles, and also sold, assigned and transferred and covenanted and agreed to sell, assign and transfer all other articles of furniture which the lessee should purchase and place, or cause to be purchased and placed upon said demised premises during the said term, it being then known to and contemplated by said parties that it would be necessary for the lessee to purchase and place a large amount of furniture on said premises, in addition to that which was then there, and it being the agreement and intention of said parties that when and so often as any additional furniture should be purchased and placed on the premises by the lessee, it should be deemed and considered as belonging to the complainant as collateral security for the payment of said rent. And the lessee, among other things, covenanted and agreed with the lessor that the said furniture and other household articles, as well as that which then was on said premises as that which should thereafter be placed thereon by the lessee, should not be sold or otherwise disposed of, or removed from said premises during the term, but should remain thereon, as the property of the complainant, as collateral security for the payment of said rent.

The bill charges that, in pursuance of the lease, the lessee entered upon the possession and enjoyment of the premises, and that large arrears of rent are due to the complainant; that after the execution of the lease, the lessee, as had been contemplated, purchased and placed on the demised premises a large amount of furniture, of the value of about \$5000, in addition to that purchased of the complainant, which still remains thereon. The complainant insists that, by virtue of his contract with the lessee, all the said furniture belongs to him as collateral security for the payment of rent, and that it cannot lawfully be sold or removed from the said premises by the said lessee, or by virtue of any process or proceedings against him.

The bill further charges, that sundry judgments at law have been recovered against the lessee, and that, by virtue of executions issued thereon, the sheriff of the County of Cape May has levied upon the said furniture on the demised premises, and advertised the same for sale. The bill prays that an injunction may be issued to restrain the sheriff from selling the said furniture, or any part thereof, and from removing the same from the demised premises. An injunction issued pursuant to the prayer of the bill. The defendant now moves to dissolve the injunction for want of equity in the bill.

The question at issue turns upon the validity and effect of the

contract between the complainant and Laird relative to the furniture and other household articles specified in the agreement. As to so much of the furniture as was sold by the complainant to Laird, and which was upon the premises at the date of the lease, the validity of the contract is not called in question. But in regard to that part of the furniture which was not at the time owned by the lessee, but which it was then contemplated should thereafter be purchased and placed upon the premises, it is insisted that the contract is invalid and inoperative (2 Story's Eq. Jur., § 875; 1 Eden on Inj., Waterman, 15 p. note). . . .

To authorize the interference of the Court, the complainant must show by his bill the existence of a right, legal or equitable, and the danger of the deprivation of that right. No fraud is imputed to the parties in the making of the agreement. It must be assumed that the contract was made in good faith and for the purpose of securing a *bona fide* debt thereafter to grow due.

The objection is, that a valid sale or transfer cannot be made of chattels which at the time of the contract are not owned by the vendor, and have no actual or potential existence. It is clear that, if valid at all, the contract must be valid as a chattel mortgage. It is not a pledge. These chattels were not delivered, and they were not capable of delivery at the time of the contract. They had no existence. At the common law, there cannot be a technical pledge of property not then in existence or to be acquired by the pledgor *in futuro* (Story on Bailments, §§ 286, 294).

It is equally clear that the contract cannot operate as a legal sale or mortgage of the chattels. To constitute a valid sale at law, the vendor must have a present property, either actual or potential, in the thing sold (*Grantham v. Hawley*, Hobart's R. 132; Co. Lit. 285, a, note 1; *Robinson v. Macdonnell*, 5 Maule & S. 228; 2 Kent's Com. 468; 1 Parsons on Cont. 437; Story on Sales, §§ 185, 186).

It is not necessary that the vendor should have the actual property, or that the chattels should have an actual existence. It is enough that he have it potentially. The distinction was taken in the early case of *Grantham v. Hawley*, already referred to. The lessor in that case covenanted that the lessee of a term might take the corn that should be growing at the end of the term. It was held that the words were good to transfer the property as soon as it was extant, the lessor of the land having the crops not actually, but potentially. So it was said, a parson may grant all the tithes of wool that he may have in a certain year. But a man cannot grant all the wool that shall grow upon his sheep that he shall

hereafter buy, for there he hath it neither actually nor potentially. The distinction will be found recognized in most of the leading cases, and fully stated by the elementary writers already cited.

In this case the lessee had neither actual nor potential property in the chattels mortgaged. They were articles which it was contemplated should be thereafter purchased by the lessee, and the agreement is, that when and so often as any additional furniture shall be purchased and placed on the premises by the lessee, it shall belong to the lessor as collateral security for the payment of rent, and shall not be sold or otherwise disposed of or removed from the premises during the term. It will be assumed, as the authorities clearly establish, that the agreement does not constitute a valid transfer or mortgage at law of the after acquired chattels. The real question is, whether the contract creates an equitable mortgage of the chattels which a court of equity will enforce and protect as against a subsequent execution creditor. . . .

In the present case the chattels were not delivered to the mortgagee, but remained in the possession of the mortgagor. It is true the chattels were not in the actual possession of the lessor, but they were delivered to the lessee upon the demised premises, where, in accordance with the contemplation of the parties and the terms of the agreement, they were to be used by the tenant, and from which they were not to be removed during the continuance of the term. This in no wise affected the validity of the contract, but was a delivery according to the terms and spirit of the contract, which perfected the equitable title of the mortgagee.

In the more recent case of *Mitchell v. Winslow*, 2 Story's R. 630, this question underwent a more elaborate examination, by Mr. Justice Story, in the Circuit Court of the United States. The Court held that to make a grant or assignment valid at law, the thing which is the subject of it must have an existence, actual or potential, at the time of such grant or assignment. But the courts of equity support assignments, not only of choses in action, but of contingent interests and expectations, and also of things which have no present actual or potential existence, but rest in mere possibility only. . . .

A further question occurs, viz., whether, admitting the equitable mortgage to be valid against the mortgagor, and all persons claiming under him with notice, it will be enforced against a subsequent judgment creditor of the mortgagor. It was so held by Vice-Chancellor Wigram in the case of *Langton v. Horton*, 1 Hare, 549. The subject afterwards underwent a more elaborate examination

by the same learned judge, in the case of *Whitworth v. Gaugain*, 3 Hare, 416, where the grounds of his conclusion are clearly and convincingly stated. . . .

The motion to dissolve the injunction is denied with costs.

LOOKER v. PECKWELL

SUPREME COURT OF NEW JERSEY, 1876

(38 N. J. Law, 253)

In replevin. On error to the Essex Circuit.

VAN SYCKEL, J. This cause was tried in the Essex County Circuit Court, by consent of parties, before the Court without a jury, upon admitted facts. A brief statement will present the point in issue. One John M. Mackenzie, to secure his debt to the plaintiff, executed to him a mortgage upon the fixtures, stock and materials, &c., of his bakery in Newark, described therein as follows: "All the bake-house fixtures and utensils now being in and about my bakery, No. 413 Broad street; also, all flour, &c., and all other stock manufactured, and unmanufactured, and all materials whatsoever being in and about said bakery, or that may at any time during the continuance of this mortgage be purchased and obtained to replenish and replace the same or any part thereof, together with," &c.

The mortgage was duly registered, as required by law. After the delivery of the mortgage, Mackenzie, in order to replenish his stock, purchased twenty barrels of flour, which were delivered to him on the sidewalk in front of his bakery, where they were seized by the defendant as sheriff, by virtue of an execution in his hands, upon a judgment in favor of Totten against said Mackenzie, for goods sold to him after the making and registering of the mortgage, and before the purchase of said twenty barrels of flour, which were purchased of other parties. The question submitted on the case is, whether the twenty barrels of flour were subject to the lien of the mortgage?

Perkins, tit. Grants, § 65, says: "It is a common learning in the law, that a man cannot grant or charge that which he hath not." A grant will operate only upon goods which the grantor has actually or potentially at the time of the grant.

Chief Justice Tindall fully recognized this rule in *Lunn v. Thornton*, 1 Com. Bench, 379, which has since been received as authority

both in England and this country, as applicable to sales as well as to mortgages.

The suggestion of Chief Justice Tindall, that the grant might be so framed as to give the grantee a right between themselves to seize after-acquired goods of the grantor, was acted upon in *Congreve v. Evetts*, 10 Exch. 298; *Hope v. Hayley*, 5 Ellis & B. 830, and in other cases cited below, but the doctrine held in the principal case has not been shaken; on the contrary, it is in a mass of cases declared to be settled, if not elementary law (*Gale v. Burnell*, 7 Q. B. 850; *Chidell v. Galsworthy*, 6 C. B. [N. S.] 471; *Jones v. Richardson*, 10 Metc. 481; *Barnard v. Eaton*, 2 Cush. 294; *Rice v. Stone*, 1 Allen, 566; *Low v. Pew*, 108 Mass. 347; *Van Hoozer v. Cory*, 34 Barb. 9; and many other cases cited in Benjamin on Sales, § 79, note k).

That this is the rule at law, is regarded by Chancellor Green in *Smithurst v. Edmunds*, 1 McCarter, 408, as beyond controversy. He says that to constitute a valid legal sale, the vendor must have a present property, either actual or potential, in the thing sold.

The judgment of the Court below in favor of the defendant was right, and should be affirmed.

BRETT v. CARTER

DISTRICT COURT OF THE UNITED STATES, MASSACHUSETTS DISTRICT, 1875

(2 Lowell, 458)

Bill in equity by the assignee in bankruptcy of one Osborne N. Sargent, against a mortgagee of the stock of stationery and other similar goods. It appeared that Sargent bought out the stock in trade of the defendant Carter, as carried on by him at a certain place, in November, 1874, and on the same day he gave back a mortgage to secure the payment of the purchase money by installments, represented by promissory notes extending over a period of four years. The mortgage conveyed the stock "and any other goods which may from time to time, during the existence of this mortgage, be purchased by the grantor and put into said store to replace any part of said stock which may have been disposed of." Among the covenants was one, that, if the stock should be diminished "faster than said sum hereby secured is paid, said grantor is to furnish further security for said sum, whenever required by said grantee."

Two of the notes were duly paid, but one that came due in November, 1875, was not paid in full, and the defendant demanded further security, and a mortgage was given of such stock as had been acquired during the year. This mortgage was given about two weeks before the petition in bankruptcy was filed, and the theory of the bill was that it was a preference. The complainants afterwards asked leave to amend, and allege the first mortgage to be void, on the ground that the mortgagor was tacitly permitted to sell the goods in the ordinary course of his trade.

The defendant insisted that both mortgages were valid.

LOWELL, J. The Court of Appeals of New York decided, by a bench which was equally divided in opinion, that a mortgage of chattels which permits the mortgagor to continue in possession and to sell the goods in the ordinary course of business, is void on its face, as mere matter of law (*Griswold v. Sheldon*, 4 Comstock, 581). This decision has had a remarkable following, and its doctrine appears to have become the settled law of New York,¹ Ohio and Illinois. It is not the law of England, Maine, Massachusetts, Michigan, or Iowa. In several States it has not been passed upon. But as this new doctrine, or, rather, revival of an old one, has been said by Mr. Justice Davis, of the Supreme Court, to be so general and just that it may be presumed to be the law of Indiana, in the absence of express and unambiguous decisions of the courts of that State to the contrary, and as I venture to doubt both the generality and the justice of the doctrine, it becomes me, with all the respect I feel for that opinion, to state my reasons for not acceding to it. If the rule, whichever way it may be, were a settled rule of property in Massachusetts, inquiry into its history or justice would be unnecessary; but although I have no doubt my decision will accord with the law of Massachusetts, I have not found a case in this State in which the decisions in New York were reviewed, and it is possibly still a question for discussion.

I had supposed it to be well settled, after much debate and conflict of opinion, certainly, but substantially settled, that when a vendor or mortgagor was permitted to retain the possession and control of his goods and act as apparent owner, the question whether this was a fraud or not was one of fact for the jury, excepting under a peculiar clause of the bankrupt law of England. It is so pronounced by Mr. May, in his valuable treatise on *Voluntary*

¹ See *Zartman v. First National Bank*, *infra*. Cf. *Conkling v. Shelley*, 28 N. Y. 360 (1863).

and *Fraudulent Conveyances*, p. 126, and by the cases he cites, and by the learned editors, both English and American, of *Smith's Leading Cases*, notes to *Twyne's Case*, Vol. I., p. 1, &c. By the law of England, as I understand it, there are no constructive or artificial frauds, or, if the term is preferred, frauds in law, remaining, excepting, first, such as are expressly made so by statute; as, for instance, when a bankrupt retains the order and disposition of goods, as apparent owner, with the consent of the true owner. We have not adopted this part of the bankrupt law, as was somewhat emphatically said in a late case in the Supreme Court, *Sawyer v. Turpin*, 91 U. S. (1 Otto) 114, 121; or, second, Where the act is necessarily a fraud on creditors, as where an insolvent person gives away a part of his estate for no valuable consideration, or the whole of it to one antecedent creditor. These, to be sure, are examples, but very few others could be adduced, and I understand the true law both here and in England to have been, until lately, that a conveyance for valuable present consideration is never a fraud in law on the face of the deed, and, if fraud is alleged to exist, it must be proved as a fact; and that was the law even before registration was required for the benefit of persons dealing with the mortgagor.

It is very strange that after our Legislatures have met the difficulty in *Twyne's Case*, by requiring registration, which gives not only constructive, but in most cases actual notice of mortgages, and when many of them have provided that fraud shall be a question of fact for the jury, the decisions which I have cited, and others following them, should have reverted to the harsher doctrine which had already grown obsolete before the laws provided any notice at all, or any rule of evidence about fraud.

It is plain that such a doctrine virtually prevents a trader from mortgaging his stock at any time for any useful purpose, for if he cannot sell in the ordinary course of trade, or only as the trustee and agent of the mortgagee, he might as well give possession to the mortgagee at once and go out of business. In this case he never could have begun business, for the whole stock was supplied by the defendant. I would refer in this connection to the very able opinions of Judge Dillon in *Hughes v. Cory*, 20 Iowa, 399, and of Judge Campbell in *Gay v. Bidwell*, 7 Mich. 519, in which they refuse to follow the decisions in New York, and give reasons for that refusal, which, in my judgment, are unanswerable.

If it be said that this is one of those cases in which fraud is a necessary result of the deed, all I can say is that this brings us to

an ultimate fact of observation and experience, and I am unable to see the necessity. Indeed, it is much more difficult for me to see how creditors can be defrauded in such a case, when they are told in the deed itself that the debtor has no credit and no property that he can call his own, than that the mortgagee is most outrageously defrauded by such a rule, which devotes his property to the payment of another person's old debts the very instant that he has parted with the possession, taking back a security which is admitted to be honestly given. Take this very case as an illustration. It is admitted there was no fraud in fact; that the trader's whole stock was supplied by the defendant; that the mortgage shows that all the stock, present and future, is hypothecated, not as a cover or blind, for there was none, but to the payment of a certain debt by certain installments. No offer is made to prove that any one was deceived, or even was ignorant of the mortgage, but I am asked to find fraud in law when I know, and it is admitted, there was none in fact.

The second point in this case is no less interesting than the first. By the mortgage, the stock that shall be put into the shop by the mortgagor is included in the conveyance. It is undoubtedly the law of courts of equity, as cases presently to be cited will show, that after acquired chattels definitely pointed out, as, for instance, by reference to the ship, mill, or place into which they are to be brought, may be lawfully assigned as security. The common law recognizes such transfers of land by way of estoppel, and of chattels when they are the produce of land or of chattels already owned by the transferrer, but not of future chattels *simpliciter*, unless there be some *novus actus interveniens* after the chattels are acquired; that is to say, either some new transfer, or possession taken under the old. It may be cause of regret that the law should be different in the courts of common law and equity, but this is of no importance in bankruptcy, because it has been the law for a great while that an assignee in bankruptcy takes only the beneficial interest of the bankrupt; and the courts of law have admitted equitable defences, such as equitable liens, &c., to be set up in such cases, years before they had power by statute or usage to admit equitable pleas in ordinary controversies; and it was every day's practice to find these courts passing upon equitable titles in behalf of a defendant, which they professed to know nothing about, and certainly could not deal with, if relied on by a plaintiff. Such was and is the law, and a very just law, as far as it goes.

But granting the rule in equity to be that after-acquired chat-

tels may be mortgaged, the point that has given me most difficulty is whether such is the law of Massachusetts. I suppose that the Federal courts, in all matters of title to property, whether real or personal, when there is no question of commercial or maritime or general law, and none of the conflict of laws, are as much bound in equity as at common law by the jurisprudence of the State in which they sit.¹ Or, in other words, I understand that the thirty-fourth section of the judiciary act, making the laws of the State the rule in actions at common law, is declaratory only, and that on both sides of this Court I am bound to follow the law of Massachusetts in the local questions, and the general law in general questions.

Now, the only decision I can find in equity in this State upon this subject certainly decides very distinctly that even in equity a mortgage of after-acquired chattels is invalid (*Moody v. Wright*, 13 Met. 17). In that case the Court refused to follow the then recent decision of Story, J., in *Mitchell v. Winslow*, 2 Story, 630, and relied largely on the dictum of a very distinguished judge, Baron Parke, who said, in *Mogg v. Baker*, 3 M. & W. 195, that there was no such lien in equity. Some years after these decisions were rendered the House of Lords unanimously followed the doctrine of Judge Story, and reversed a decision of Lord Campbell, which had been founded on the dictum already referred to, and Baron Parke concurred in the reversal (*Holroyd v. Marshall*, 10 H. of L. 191). This was not a new doctrine in courts of equity. (See *Curtis v. Auber*, 1 Jac. & W. 532; *Re Ship Warre*, 8 Price, 269; *Langton v. Horton*, 1 Hare, 549; *Douglas v. Russell*, 4 Sim. 524; 1 Myl. & K. 428; *Re Howe*, 1 Paige, 129.)

Considering the decision of Judge Story in this circuit, and the reasons given by the Court of Massachusetts for not following it, and the entire consistency of all the recent decisions with Judge Story's views, and the disappearance of Baron Parke's dictum, I am not prepared to say, that if the supreme judicial court were now asked to review their decision in *Moody v. Wright*, it is at all certain they would not reverse it, and under the circumstances I do not feel bound to hold that that case furnishes a settled rule of property which I must follow. So far from that, I believe that the law of Massachusetts in equity is that a mortgage of after-acquired chattels is valid.

I am of the opinion that the mortgage of 1874 created a valid lien in behalf of the defendant upon the stock of goods in the shop

¹ See *Thorley v. Pabst Brewing Co.*, 179 Fed. 338 (1910).

at the time of the bankruptcy, and that the mortgage of 1875 does not vitiate this lien. The fixtures, however, which were not mentioned in the first mortgage, cannot be held by the second, because that was given after the bankrupt had become insolvent, to the knowledge of the defendant.¹

Decree accordingly.

KRIBBS v. ALFORD

COURT OF APPEALS OF NEW YORK, 1890

(120 N. Y. 519)

Appeal from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of June, 1887, which affirmed a judgment in a suit for foreclosure in favor of plaintiff entered upon the report of a referee. The nature of the action and the facts are sufficiently stated in the opinion.

PARKER, J. On the 15th day of May, 1880, one Johnson, then being the owner in fee of certain lands, executed and delivered to Thomas Argue an instrument in writing (which for convenience will hereafter be termed a lease), which conferred upon the latter the exclusive right to produce oil and gas from said land for a period of twelve years. For that purpose it permitted him to go upon the land and make necessary erections; but as to any other use Johnson reserved the possession and right of enjoyment. It gave to Argue the right to remove any and all tools, boilers, engines and machinery; also the casing to the wells and drive-pipe, if Johnson should refuse to pay a fair price therefor.

Pursuant to the terms of the lease Argue and his assignees placed upon the property engines, boilers and other machinery necessary to carry on the operations for which the lease provided, and in view of the intent of the parties as manifested by the terms of the lease and otherwise, these articles retained their character of personalty after annexation (*Potter v. Cromwell*, 40 N. Y. 287;

¹ *Scharfenburg v. Bishop*, 35 Ia. 60 (1872), *accord*. This is the prevailing view. The contrary opinion, which formerly prevailed in Illinois (*Hunt v. Bullock*, 23 Ill. 320 [1860]; *Palmer v. Forbes*, *id.* 301) seems to have

been dissipated. *Borden v. Croak*, 131 Ill. 68 (1889).

The authorities are collected in an article by Samuel Williston, 19 *Harv. Law Rev.* 557-585 (1906).

Murdock v. Gifford, 18 *id.* 28; *Hoyle v. P. & M. R. R. Co.*, 54 *id.* 314, 324; *McRea v. C. N. Bank*, 66 *id.* 489-495).

In October, 1880, Argue assigned his interest in the lease to Albert Garrett and Adam Prentice. Thereafter Adam Prentice, to secure the payment of \$950.50, executed and delivered to the plaintiff a mortgage on his undivided interest in the lease and upon all "his interest in the oil wells now thereon and to be by him placed thereon, with all his interest in the structures, fixtures, equipments and appurtenances now on said lease or hereafter to be placed thereon." On the 10th of January, 1881, a copy of the mortgage was filed in the Town Clerk's office, and thereafter it was duly refiled. Subsequently, and on the 24th day of August, 1882, Garrett and Prentice sold and assigned all their rights and interests under the lease to the defendants Alford and Curtis, who thereafter finished one well, put down two others, and added largely to the plant by way of engines, boilers and other machinery.

And the substantial question presented by this appeal is, whether the tubings, casings, engines, boilers, shafting and other machinery purchased and placed upon the property after the giving of the mortgage are embraced within it. True, the appellant contends that his title to the chattels is not burdened with the plaintiff's mortgage, because, as he alleges, Alford and Curtis purchased in good faith and without notice; but this claim is not well founded, for while a search, which failed to disclose the existence of a mortgage, was timely made in the Town Clerk's office, the referee has found upon sufficient evidence to support it, that the mortgage was filed as a chattel mortgage in the proper Town Clerk's office, and within thirty days of the expiration of the year thereafter it was refiled with the statement required by statute. Alford and Curtis are, therefore, chargeable with constructive notice, and the lien of the plaintiff is not affected by their failure to find the mortgage.

In some jurisdictions validity is denied to a contract in so far as it purports to embrace property to be acquired after date. The reason assigned for this holding is tersely stated in Perkins (sec. 65): "It is a common learning in the law that a man cannot grant or charge that which he hath not." In others it is held to be invalid in law and yet operative in equity. Unexplained, this seems to be a solecism, and results from a use of language which fails to accurately convey the idea intended. Invalidity at law imports nothing more than that a mortgage of property thereafter to be acquired is ineffectual as a grant to pass the legal title. A court of

equity, in giving effect to such a provision, does not put itself in conflict with that principle. It does not hold that a conveyance of that which does not exist operates as a present transfer in equity, any more than it does in law. But it construes the instrument as operating by way of present contract to give a lien, which, as between the parties, takes effect and attaches to the subject of it as soon as it comes into the ownership of the party. Such we deem the rule to be in equity in this State (*McCaffrey v. Woodin*, 65 N. Y. 459; *Wisner v. Ocumpaugh*, 71 *id.* 113; *Coats v. Donnell*, 94 *id.* 168-177).

As between the mortgagor, or his assignee, and the mortgagee, therefore, the chattel mortgage operated to create a lien in equity as to the chattels purchased and placed upon the property by the mortgagor subsequent to its date. This lien the trial court rightly enforced by its judgment. But it went further and declared, in effect, that the lien attached to the personalty placed upon the property by the assignees of the mortgagor as well. This, we think, was error. The assignees did not contract that the machinery to be placed upon the property by them should be subject to the provisions of the mortgage. They did not assume or agree to pay the mortgage or carry out its provisions. Indeed, the assignment contained no condition or covenant whatsoever, and the assignees did not even know of the existence of the mortgage. Their acceptance of the lease bound them to fulfill the covenants running with the land (113 Penn. St. 83; *Spencer's Case*, 1 Smith's L. C. 145). But it did not, in addition, burden them with the obligation to make good the personal covenants given by the lessee to third parties as security for an indebtedness, because they had constructive notice of the existence of the mortgage the lien of plaintiff can be enforced, and the defendants deprived of the machinery on the premises at the time of the purchase by them of the lease. But the lien provided for by the instrument could in any event only extend to property thereafter acquired by the mortgagor. It could not attach to chattels to which the mortgagor has not acquired either title or possession. Indeed, it does not, by its terms, purport to embrace any other after-acquired property than that placed thereon by the mortgagor.

It follows, from the views expressed, that the judgment should be reversed and a new trial granted, with costs of this court to the appellant, unless, within thirty days, the plaintiff stipulate to modify the judgment by excepting therefrom the articles placed on the property after the assignment to Alford and Curtis, and

described in Schedule D., in which event the judgment as modified is affirmed, with costs to the appellant.

All concur except Bradley and Haight, JJ., not sitting.

Judgment accordingly.

ROCHESTER DISTILLING CO. v. RASEY

COURT OF APPEALS OF NEW YORK, 1894

(142 N. Y. 570)

Appeal from order of the General Term of the Supreme Court in the fifth judicial department, made October 4, 1892, which reversed a judgment in favor of defendant, entered upon a verdict directed by the court, and granted a new trial.

In February, 1890, the plaintiff recovered a judgment against one Lovell for \$147.44. In April, 1890, Lovell, being the lessee of certain farm lands, in order to secure one Page as an accommodation indorser and for the repayment of money borrowed from him, executed and delivered to him a chattel mortgage; which covered "the grass now growing upon the premises leased, etc.; also all the corn, potatoes, oats, and beans, which are now sown or planted, or which are hereafter sown or planted during the next year, etc." At the time, but a small part of the land had been planted with potatoes, and the greater part of the planting of potatoes, and all that of the beans, was done in the following month. On July 5th an execution was issued upon plaintiff's judgment, and the sheriff levied upon the growing crops and advertised their sale in August; at which sale plaintiff purchased them. After the levy by the sheriff, Page, the chattel mortgagee, on July 15th foreclosed under his mortgage, gave notice and sold the growing crops to the defendant. Defendant took possession of the property so purchased and this action was brought to recover its possession. The trial judge, being moved by each of the parties for a verdict in his favor, directed it for the plaintiff as to the beans and for the defendant as to the potatoes and ordered the exception taken to that direction to be heard, in the first instance, at the General Term. That court sustained the plaintiff's exception to the ruling of the trial judge and ordered a new trial; but allowed an appeal to this court, on the ground that a question of law was involved which ought to be reviewed.

GRAY, J. I think this case does not, in principle, differ from any other case, where a chattel mortgage has been given upon property in expectancy and which has no potential existence at the time of its execution. The fact that the subject of the mortgage is a crop to be planted and raised in the future upon land does not affect the determination of this question upon established principles. It may be that precisely such a case, in its facts, has not been passed upon in this court; but there are expressions of opinion, in several cases of a kindred nature, in the reports of this court and of other courts in this State, which leave us in no doubt as to the doctrine which should govern. The proposition that a mortgage upon chattels having no actual, nor potential, existence, can operate to charge them with a lien, when they come into existence, as against an attaching, or an execution creditor, has frequently been discountenanced and repudiated. *Grantham v. Hawley*, Hobart, 133, is the general source of authority for the proposition that one may grant what he has only potentially, and there is no good reason for doubting that that which has a potential, or possible existence, like the spontaneous product of the earth, or the increase of that which is in existence, may properly be the subject of sale, or of mortgage. The right to it, when it comes into existence, is regarded as a present vested right. That which is, however, the annual product of labor and of the cultivation of the earth cannot be said to have either an actual, or a potential existence before a planting.

This action being one at law, the inquiry is limited to ascertaining the strictly legal rights of two contending creditors to the property of their debtor, Powell, in the crops which he had raised. It is unlike some of the cases, which have arisen between the lessor of land and his lessee. In such a case, a different principle might operate to create and support the lien of the landlord upon the crops, as they come into existence upon the land. The title to the land being in him, an agreement between him and the lessee for a lien upon the crops to be raised, to secure the payment of the rent, would operate and be given legal effect, as a reservation, at the time, of the title to the product of the land. That was the case of *Andrew v. Newcomb*, 32 N. Y. 417, where the owner of land agreed with another that he might cultivate it at a certain rent; the crop to remain the property of the landlord, until the tenant should give him security for the rent. Judge Denio repudiated the idea that the arrangement could be called a conditional sale of the flax; because the subject was not in existence. He held that the idea

of a pledge or of a sale had no application and that the effect of the contract was to give to the landlord the original title to the crop. His remarks upon the subsequent vesting of the title to crops, when they come into being, have reference to such an arrangement between landlord and tenant and not to the case of a mortgage, or conditional sale to some third person of crops yet to be planted. Mr. Thomas, in his work on Chattel Mortgages, upon the subject of mortgaging a crop not yet planted, says (§ 149) "the weight of authority inclines to the view that the lien is an equitable one and differs, in some respects, from the charge created by a mortgage of property in existence at the date of the agreement;" and, again, he says "the authorities are mainly to the effect that such a mortgage conveys no title or interest as against attaching, or judgment creditors of the mortgagor." About this question of mortgaging personal property, to be subsequently acquired, much has been written in the books, which I deem unnecessary to resume here at any great length. It results from a review of the authorities that a mortgage cannot be given future effect as a lien upon personal property, which, at the time of its delivery, was not in existence, actually or potentially, when the rights of creditors have intervened. At law such a mortgage must be conceded to be void. The mortgage could have no positive operation to transfer *in præsenti* property not *in esse*. At furthest, it might operate by way of a present contract between the parties that the creditor should have a lien upon the property to be subsequently acquired by his debtor, which equity would enforce as against the latter.

In *Bank of Lansingburgh v. Crary*, 1 Barb. 542, Paige, J., observed: "I strongly incline to the opinion that a chattel mortgage can only operate on property in actual existence at the time of its execution; that it cannot be given on the future products of real estate; and that if given one day, or one week, before the product of the land comes into existence, it is as inoperative as if the chattel mortgage had been given on a crop of grass or grain, one, two, or three years previous to its production."

In a subsequent case, the same learned judge considered the nature of a mortgage relating to property not then in existence and its effect as to creditors of the mortgagor. In *Otis v. Sill*, 8 Barb. 102, the plaintiff claimed under a chattel mortgage, which, after describing the property mortgaged, contained the following clause: "All scythes manufactured out of the said iron and steel and all scythes, iron, steel and coal which may be purchased in lieu

of the property aforesaid." Subsequently, the property was taken under executions issued on judgments and the action was brought for its taking and detention. Paige, J., refers to his opinion in *Bank of Lansingburgh v. Crary*, that a chattel mortgage could only operate on property in actual existence at the time of its execution. He elaborately discusses the question of whether such a mortgage was a lien upon the property when acquired, as against the creditors of the mortgagor, and reviews very many authorities in England and some in this country. His conclusions were adverse to the proposition. He held that, as to subsequently acquired property, the mortgage could only be regarded as a mere contract to give a further mortgage upon such property and that no specific lien was created thereby. He says, "I have come to the conclusion, as the result of all the authorities, that if the mortgage in this case did amount to a contract to execute a further mortgage on subsequently acquired property, it was good as an executory contract only and did not constitute a lien on the articles of the kind mentioned therein when subsequently purchased." In *Gardner v. McEwen*, 19 N. Y. 123, the chattel mortgage to the plaintiff, upon property in the store, "or which might thereafter be purchased and put into store," was held inoperative to convey the title to the after-acquired property, as against the defendant, who purchased it at a sale under execution upon a judgment against the mortgagor. *McCaffrey v. Woodin*, 65 N. Y. 459, was an action in trover. Plaintiff was lessee and defendant was agent for the lessor. The former covenanted in the lease that the latter should have "a lien as security for the payment of the rent" on all the personal property, etc., which should be put upon the premises, "and such lien to be enforced, on the non-payment of the rent, by the taking and the sale of such property in the same manner as in cases of chattel mortgages on default thereof." By virtue of this provision in the lease, the defendant took the farm produce. The decision upheld the right of the landlord to do so; holding that as the crops came into existence they vested in the landlord. It is to be noted that the court considered the case as one to be governed by equitable principles, observing that "the matter comes up solely between the parties, there being no intervening rights of creditors." Referring to *Gardner v. McEwen* (*supra*), it was remarked that that "is a case between the mortgagee and creditors and was affected by our act concerning filing chattel mortgages." Treating the question as one for the application of equitable principles, it was held that the lessor was entitled to set up her equitable rights, as a defense

to the plaintiffs' (the lessee's) action of trover. In the same case, Gray, C., observed that, if the relation of mortgagor and mortgagee had been created between the parties, "it was inoperative upon any property which at the time of its execution was not actually, or potentially, either possessed or owned by McCaffrey." In *Cressey v. Sabre*, 17 Hun, 120, where the opinion was delivered by Boardman, J., and was concurred in by Justices Learned and Bockes, a chattel mortgage upon potatoes (among other articles of property), which were not yet planted, was held inoperative. The distinction was there mentioned between a case like *McCaffrey v. Woodin*, where the question of title was between the parties to the contract and one where it arose between the mortgagee and a third person. In *Coats v. Donnell*, 94 N. Y. 168, Andrews, J., observed that "a contract for a lien on property not *in esse* may be effectual in equity to give a lien as between the parties, when the property comes into existence and where there are no intervening rights of creditors or third persons." *Kribbs v. Alford*, 120 N. Y. 519, recognizes the invalidity at law of a chattel mortgage of property thereafter to be acquired, but holds that as between the parties their contract would be construed in equity as creating an equitable lien, which could be enforced.

The idea of a chattel mortgage is that of a conveyance of personal property to secure the debt of the mortgagor; which, being conditional at the time, becomes absolute if, at a fixed time, the property is not redeemed, and the statute makes it valid, as against creditors of the mortgagor, only when filed as directed. The statute provides for the filing as a substitute for "an immediate delivery," or "an actual and continued change of possession of the things mortgaged." Such provisions seem to me to exclude the idea of a chattel mortgage upon non-existent things; or that such an instrument could operate to defeat the lien of an attaching, or an execution creditor upon subsequently acquired property. Regarding the chattel mortgage in question as a mere executory agreement to give a lien when the property came into existence, some further act was necessary in order to make it an actual and effectual lien as against creditors. But there was no further act by the parties to the instrument to create such an actual lien and the levy of the execution upon the crops operated to transfer their possession from the owner to that of the sheriff. As against his possession the equities of the mortgagee are unavailing for any purpose. Between the two creditors it is a question of who had gained the legal right to have the crops in satisfaction of his claim

and the equitable right of the mortgagee to them, as against his debtor, was defeated by the seizure at the instance of the judgment creditor. We are satisfied as to the correctness of the conclusion reached by the General Term below, that there should have been a direction of a verdict for the plaintiff for the potatoes and beans, obtained from the planting done after the execution and delivery of the mortgage.

The order appealed from should be affirmed and, under the stipulation, judgment absolute should be ordered for the plaintiff, with costs in all the courts.¹

All concur, except Earl, J., not voting.

Ordered accordingly.

ZARTMAN v. FIRST NATIONAL BANK

COURT OF APPEALS OF NEW YORK, 1907

(189 N. Y. 267)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 27, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at an Equity Term.

The object of this action was to determine the rights of the parties to a fund realized from a sale in bankruptcy of the property of the Waterloo Organ Company, a manufacturing corporation formerly carrying on the business of making and selling organs, pianos and other musical instruments in the village of Waterloo. All the property of the company, both real and personal, was sold in one parcel, free from liens, by order of the United States District Court, and the value of such chattels included therein as were acquired by the company after it had given a corporate mortgage to secure its bonds issued and negotiated in the usual way, was the sum of \$15,480. The judgment directed in favor of the plaintiff consisted mainly of that sum and there is no controversy over any other item. Upon appeal to the Appellate Division the judgment was affirmed, one of the justices dissenting, and the defendant appealed to this court.

¹ *Butt v. Elliott*, 19 Wall. 544 (1873); *Wheeler v. Becker*, 68 Iowa, 723 (1886), *contra*. But see *Comstock v. Scales*, 7 Wis. 159 (1858), denying effect to

a mortgage of a crop made after planting.

Chick v. Nute, 176 Mass. 57 (1900), *per HOLMES, C. J., accord*.

VANN, J. The question presented by this appeal is whether, in a mortgage given by a manufacturing corporation upon all its property, real and personal, to secure its negotiable bonds with the right of possession and enjoyment in the mortgagor for its own use and benefit until default, a clause, purporting in terms to cover after-acquired personal property, is good as to shifting stock and material on hand when possession was taken by the mortgagee pursuant to the provisions of the mortgage, one day after default in the payment of interest and three days before the commencement of bankruptcy proceedings against the mortgagor, as to the trustee in bankruptcy subsequently appointed therein?

To the extent that the mortgage covered personal property it was a chattel mortgage, but as it was executed by a corporation to secure the payment of its bonds and was duly recorded as a mortgage of real property, according to the provisions of the Lien Law, there was no necessity for filing or refiling it as a chattel mortgage. (L. 1897, ch. 418, § 91). No question is raised as to the lien of the mortgage upon machinery, tools and appliances belonging to the manufacturing plant, for the controversy is confined to musical instruments on hand, finished and unfinished, and materials from which other instruments might be made.

The learned counsel for the appellant, in an able argument, contended that while the mortgage did not create an absolute lien upon stock and materials acquired after its date, it operated as an executory contract to deliver possession upon default and to place the property as it then existed under the lien of the mortgage. He conceded that property of this nature is subject to seizure on execution by unsecured creditors during the period while it is subject to the disposal of the mortgagor and until the trustee pursuant to the mortgage takes possession of it, but insisted that the act of taking possession ripens the lien of the mortgage and makes it absolute as against general creditors or those with no prior lien.

The mortgage provided that "until default shall be made in the payment of the interest or principal of the said bonds or some of them . . . it shall be lawful for the said party of the first part and its successors peaceably and quietly to have, hold, use, possess and enjoy the said premises and property, with the appurtenances, and to receive the income and profits thereof to its own use and benefit without hindrance or interruption" from the mortgagee or its successors. This clause gave the mortgagor power to sell for its own benefit all materials and products until the trustee took possession after default in the payment of interest. No limitation

is placed by the mortgage upon the use to be made of the proceeds derived from the sale of the stock and materials. As was said by the learned justice who wrote for the Appellate Division: "The mortgagor was given unrestricted dominion over this mortgaged property or whatever was subsequently acquired. It might sell or dispose of all the personal property. It was permitted to use the income or profits of the business. It was not required to expend these avails in keeping the stock good, nor for the development of the business or in its management in any way," but could use them for its own benefit "precisely the same as if no lien existed." Conceding that the right of the mortgagor to receive the profits to its own use means a proper and legitimate corporate use, still the use permitted was independent of the mortgage or any lien supposed to be created thereby.

As was said in a case upon which both parties rely: "The right of the mortgagor in the meantime," that is, until default, "to the use of the earnings, amounts, practically, to absolute ownership, and hence the mortgage cannot operate as a lien upon such earnings to the prejudice of the general creditors until actual entry and possession taken, *and then only upon what is earned after that time*. The lien of the mortgage upon future earnings is consummated as against other creditors only by the fact of the possession of the property, and cannot have any retroactive operation, since it would then deprive the unsecured creditor of the fund, upon the faith of which he may have given credit to the mortgagor during the time when the latter was permitted to deal with and use it as its own. The lien upon the earnings, in favor of the bondholders, attaches only upon what is earned after the time when the lien is perfected by entry and possession." (*N. Y. Security & Trust Co. v. Saratoga Gas & El. L. Co.*, 159 N. Y. 137, 143.)

If a lien was created by the mortgage upon property not in existence at its date, possession after it came into existence was of no importance. If no lien was created by the mortgage upon such property, the taking of possession pursuant to its terms did not create one as against general creditors, who are presumed to have dealt with the mortgagor in reliance upon its absolute ownership of the stock on hand. While the record of the mortgage was notice to all, it was notice of all its terms, which included the right of disposition for the use and benefit of the mortgagor, with no duty to apply the avails upon the mortgage indebtedness. If the question had arisen between the parties to the mortgage, equity might recognize a contract to give a lien and treat it as an actual lien, but

it arises between the mortgagee and the general, unsecured creditors, who had little, if anything, to rely upon except the shifting stock, which, directly or indirectly, they themselves had furnished. The credit extended by them enabled the mortgagor to carry on business, and if the product of that credit goes to the mortgagee, not only are they helpless, but, if the law is so declared, hereafter manufacturing corporations needing credit will be helpless also. If it is understood that a corporate mortgage given by a manufacturing corporation may take everything except accounts and debts, such corporations, with a mortgage outstanding, will have to do business on a cash basis or cease to do business altogether. Assuming that a court of equity may uphold and give effect to such a mortgage when the rights of the mortgagor and mortgagee only are involved, it will not aid the mortgagee at the expense of subsequent creditors when their rights are involved. It will not treat a contract to give a mortgage upon a subject to come into existence in the future as a mortgage actually then given, if the result would deprive the general creditors with superior equities so far as after-acquired property is concerned, of their only chance to collect debts. It is only when the rights of third parties will not be prejudiced that equity, treating as done that which was agreed to be done, will turn a contract to give a mortgage on property to be acquired into an equitable mortgage on such property as fast as it is acquired and enforce the same accordingly against the mortgagor, his representatives and assigns. In other words, the agreement and intention of the parties to a mortgage upon property not yet in existence will be given effect by a court of equity so far as practicable, provided no interest is affected except that of the mortgagor and mortgagee, who entered into the stipulation, but equity closes its doors and refuses relief if the interests of creditors are involved. The result thus announced is founded on principle and sanctioned by authority. (*Kribbs v. Alford*, 120 N. Y. 519, 524; *Wisner v. Ocumpaugh*, 71 N. Y. 113; *McCaffrey v. Woodin*, 65 N. Y. 459; *Jones on Chattel Mortgages* [4th ed.], 170; *Beall v. White*, 94 U. S. 382, 386.)

Was the alleged lien good at law? The authorities cited by both parties show that it was not for two reasons: *First*, because a man cannot grant what he does not own, actually or potentially. *Qui non habet, ille non dat*. (*Rochester Distilling Co. v. Rasey*, 142 N. Y. 570; *Deeley v. Dwight*, 132 N. Y. 59; *N. Y. Security & Trust Co. v. Saratoga Gas & El. L. Co.*, 159 N. Y. 137; *Gardner v. McEwen*, 19 N. Y. 123; *Andrews v. Durant*, 11 N. Y. 35; *Farmers' Loan &*

Trust Co. v. Long Beach Imp. Co., 27 Hun, 89; Jones on Chattel Mortgages [4th ed.], § 138; Thomas on Chattel Mortgages, § 137; Thompson on Corporations, § 6141; 6 Cyc. 1041.)

Second, because an agreement permitting the mortgagor to sell for his own benefit renders the mortgage fraudulent as matter of law as to the creditors represented by the plaintiff. (*Skilton v. Codington*, 185 N. Y. 80, 90; *Mandeville v. Avery*, 124 N. Y. 376; *Hangen v. Hachemeister*, 114 N. Y. 566; *Potts v. Hart*, 99 N. Y. 168; *Southard v. Benner*, 72 N. Y. 424.)

In reading the authorities it is important to observe how, where and between whom the question arose, for the remarks of learned judges in discussing the rights of the mortgagor and mortgagee are not in point when the question relates to the rights of third persons as against either or both of the parties to the mortgage. Nor are they in point when, as in *Thompson v. Fairbanks* (196 U. S. 516, 522) the Federal courts feel bound to follow the decisions of the state courts as to local questions and the law of the state where the case arose differs from that of the state of New York. (*Dooley v. Pease*, 180 U. S. 126.)

As we have seen, equity takes hold of the subject with a strong hand in order to enable the mortgagee to get what the mortgagor intended to give, provided no other interest is involved, but when the creditors of the mortgagor enter the field equity goes no farther than the law and will simply enforce a lien if it exists without attempting to perfect it if something is lacking to make it complete. The taking of possession by the mortgagee is relied upon by the appellant to "ripen the lien," which, as is conceded, was inchoate before. If the contract between the mortgagor and mortgagee fell short of creating a lien, as was clearly the case, the act of taking possession did not enlarge, perfect or complete it. A mortgagee cannot add to his title by his own act. (*Stephens v. Perrine*, 143 N. Y. 476.) The defendant did not have title to the after-acquired property when it took possession. All it had, as the courts hold, was the promise of the mortgagor to give title as the property came into existence. The mortgagor did not keep its promise by giving supplementary mortgages as pianos were made or materials were purchased, or in any other way. If it had, creditors would have been warned and could have avoided the danger. Time passed and insolvency overwhelmed the mortgagor, when it was too late to give additional mortgages owing to the Bankruptcy Act. The plaintiff, as trustee in bankruptcy of the mortgagor, has the same rights as creditors armed with an attachment or execu-

tion. (*Skilton v. Codington*, *supra*; *In re Werner*, 5 Dill. 119; *In re Garcewich*, 8 Am. Bank Rep. 149; U. S. Bankruptcy Act of 1898, § 70.) When the general creditors intervened through the plaintiff, the mortgagee was simply in possession with title to the property that was in existence when the mortgage was given, but with no title to the shifting stock subsequently acquired. As to that property, it had only the promise of the mortgagor, which equity could help out by treating as done what was agreed to be done, but which it will not help out to the injury of unsecured creditors. The rights of the defendant, incomplete when it took possession, are incomplete still, for they can be perfected only by the aid of equity, and equity refuses to help under the circumstances of this case.

The judgment awarding the proceeds of the after-acquired property to the plaintiff was, therefore, properly rendered, and the action of the courts below should be sustained.

The judgment appealed from should be affirmed, with costs.

CULLEN, CH. J., GRAY, EDWARD T. BARTLETT, HAIGHT and WERNER, JJ., concur; HISCOCK, J., not sitting.

Judgment affirmed.

TITUSVILLE IRON CO. v. CITY OF NEW YORK

COURT OF APPEALS OF NEW YORK, 1912

(207 N. Y. 203)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 8, 1911, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

CULLEN, CH. J. On January 27th, 1906, one Hillman entered into a contract with the defendant board of education to furnish and install a heating and ventilating apparatus in a public school. Subsequently the plaintiff sold and delivered to Hillman certain boilers, castings and other parts of a heating apparatus which Hillman intended to use in the performance of his contract, but, so far as appears in the evidence, were not installed in the building, nor delivered to or accepted by the board of education. The plain-

tiff was never paid by Hillman for the property. In June following proceedings in involuntary bankruptcy were commenced against Hillman, and on the 18th of that month a receiver of his estate was appointed by the United States District Court. On July 9th Hillman was adjudicated a bankrupt. Meanwhile, on the 27th of June, the board of education declared Hillman's contract forfeited under the following provision contained therein:

"If the work to be done under this contract shall be abandoned by the contractor, or if this contract shall be assigned, or the work sublet by him, otherwise than is herein specified, or if the contractor shall at any time refuse or neglect to supply a sufficiency of workmen and materials of the proper skill and quality, or shall fail in any respect to prosecute the work required by this contract with promptness and diligence, or shall omit to fulfill any provision herein contained, or if at any time the superintendent of school buildings shall be of the opinion and shall so certify in writing to the committee on buildings, that the performance of the contract is unnecessarily or unreasonably delayed, or that the contractor is wilfully violating any of the conditions or covenants of this contract or specifications, or is executing the same in bad faith, or not in accordance with the terms thereof, or if the work be not fully completed within the time named in the contract for its completion, the committee on buildings shall notify the contractor to discontinue all work, or any part thereof, under this contract, by written notice, signed on behalf of said committee by its chairman or acting chairman, to be served upon the contractor either personally or by leaving said notice at his place of residence or business, or with his agent in charge of the work, or with an employé found on the work, and thereupon the contractor shall discontinue the work or such part thereof, and the Board of Education shall thereupon have the power to contract for the completion of the contract in the manner prescribed by law, or to place such and so many persons as it may deem advisable, by contract or otherwise, to work at and complete the work herein described, or such part thereof, and to use such materials as he may find upon the line of the work and to procure the material for the completion, so as to fully execute the same in every respect, and the cost and expense thereof at the reasonable market rates shall be a charge against the contractor, who shall pay the party of the first part the excess thereof, if any, over and above the unpaid balance of the amount to be paid under this contract; and the contractor shall have no claim or demand to such unpaid balance, or by reason of

the non-payment thereof to him and shall forfeit all claim to any moneys retained; and no molds, models, centres, scaffolding, planks, horses, derricks, tackle, implements, power plants, or building material of any kind belonging to or used by the contractor shall be removed so long as the same may be wanted for the work."

It also directed the superintendent to proceed with the completion of the work in accordance with the original plans and specifications, and advertised for proposals therefor. On August 11th the receiver of the bankrupt notified the board of education that he claimed the boilers and property heretofore mentioned, and on September 6th, in pursuance of an order made by the United States District Court, the receiver sold all his right and title to the plaintiff. On August 20th the board of education entered into a contract with the defendant Olivany for the performance of the Hillman contract, and in such performance that defendant, with the consent and at the instigation of the board of education, appropriated the boilers and other property of Hillman and installed them in the school building. For this conversion the plaintiff has sued the defendants.

This brings us to the consideration of the respective claims of title to the property. The plaintiff had no lien on the property for the unpaid purchase money, but at the time of the appointment of the receiver title to the property was in Hillman. It then became vested in the receiver of the bankrupt and through the sale by the receiver passed to the plaintiff unless, under the provision of the contract with Hillman, already quoted, the board of education had the right to appropriate the property. For one reason at least the judgment below cannot be sustained. Referring to the contract, it is to be observed that where a contract makes default it is provided that "the Committee of Buildings shall notify the contractor to discontinue all work, or any part thereof, . . . by a written notice, signed on behalf of said committee by its Chairman," to be served on the contractor in the manner specified, and "*thereupon*" the board of education shall have power to contract for the completion of the contract, "and to use such materials as they may find on the line of the work." The service of the notice on the contractor is made, by the contract, a condition precedent to the right to forfeit the contract and appropriate the materials of the contractor. The complaint was dismissed at the close of the plaintiff's case. There was no evidence that such a notice was ever served. We are willing, however, to dispose of the case on this narrow

ground, as on the record before us, even had the notice been served, still the act of the board would have been wrongful.

At the time of the execution of the contract Hillman had no title to the property, the subject of this suit, nor does it appear even that the property was then in existence. Therefore, he could create no lien thereon cognizable at law, whether by way of mortgage, pledge or otherwise. "It is common learning in the law that a man cannot grant or charge that which he hath not." (See Thomas on Chattel Mortgages, sec. 157; Jones on Chattel Mortgages, sec. 138.) Mortgages or contracts pledging subsequently acquired property, though void at law, will nevertheless be enforced in equity as between mortgagor and mortgagee as agreement to give liens, and also as against purchasers with notice. (*McCaffrey v. Woodin*, 65 N. Y. 459; *Kribbs v. Alford*, 120 *id.* 519.) But it seems settled law, at least in this state, that they will not be enforced as against creditors. (*Rochester Distilling Co. v. Rasey*, 142 N. Y. 570; *Zartman v. First National Bank of Waterloo*, 189 *id.* 267.) In the first case Judge GRAY said: "The proposition that a mortgage upon chattels having no actual, nor potential, existence, can operate to charge them with a lien, when they come into existence, as against an attaching, or an execution creditor, has frequently been discountenanced and repudiated" (p. 575). In the second, Judge VANN said: "In other words, the agreement and intention of the parties to a mortgage upon property not yet in existence will be given effect by a court of equity so far as practicable, provided no interest is affected except that of the mortgagor and mortgagee, who entered into the stipulation, but equity closes its doors and refuses relief if the interests of creditors are involved. The result thus announced is founded on principle and sanctioned by authority" (p. 272). In the opinions in these two cases the authorities are so fully examined and discussed as to make further review unnecessary.

The title of the contractor passed to the receiver in bankruptcy before the forfeiture authorized by the contract had accrued or the defendant taken possession, and the decision in *Skilton v. Codington* (185 N. Y. 80) as well as that in the *Zartman Case* (*supra*) are authorities to the effect that the trustee can assert the rights of creditors. We must not be misled by some of the early decisions of the Supreme Court of the United States which were made in cases arising under the Bankruptcy Act of 1867. Under that act assignee succeeded only to the title of the bankrupt except in cases where, by the express terms of the statute, certain transac-

tions were made fraudulent and void as against the act. So it was held in *Stewart v. Platt* (101 U. S. 731) that the assignee could not attack chattel mortgages void against creditors by reason of the failure to file them in the proper place. In *Hauselt v. Harrison* (105 U. S. 401) an agreement somewhat similar in effect to that before us was held to create a lien good between the parties, even though void as against subsequent purchasers without notice and creditors levying executions and attachments, and, therefore, immune from attack by the assignee in bankruptcy. This rule, however, has been changed by the present statute, which enacts that "claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate." Therefore, the title of the plaintiff was superior to any lien of the defendants.

Nor can the right of the defendant to appropriate the property as a pledge be sustained under the law of this state. Transfer of possession to the pledgee is necessary to create a valid pledge and the possession must be actual, not merely constructive, unless from the nature of the case the property is not susceptible of manual delivery and possession. (*Wilson v. Little*, 2 N. Y. 443; *Black v. Bogert*, 65 *id.* 601; *McFarland v. Wheeler*, 26 Wend. 467.) There is no evidence in the case that the board of education ever had any control or possession of the property prior to the bankruptcy. Agreement between the parties could not make that possession which was not in fact such. (*McFarland v. Wheeler*, *supra.*) At most, delivery of possession was a question of fact for the jury. (*Seidenbach v. Riley*, 111 N. Y. 560.)

There is a vital distinction between the contract in the case of *Duplan Silk Co. v. Spencer* (115 Fed. Rep. 689), and the one in the case at bar. There, as pointed out in the opinion, there was no forfeiture of unused materials, but they were applied to the completion of the contract, and if the contract was completed at a cost less than that which would be due the contractor, had he finished the contract, he was entitled to the surplus. In the present case it is expressly provided that the contractor shall have no claim for any unpaid balance and shall forfeit all claims to any moneys retained. Therefore, if on the other questions the case cited were an authority in this state, the distinction pointed out would make the decision there rendered inapplicable to the present case. It is to be also noted that in the *Duplan Silk Co.* case the opinion cites the old cases of *Hauselt v. Harrison* and *Stewart v. Platt*,

to which I have already referred and which are not authorities under the present Bankruptcy Act.

The judgment appealed from so far as relates to the defendants board of education and Olivany should be reversed and a new trial granted, with costs to abide the event.¹

HAIGHT, VANN and WILLARD BARTLETT, JJ., concur with CULLEN, Ch. J., and HISCOCK, J., concurs in result; COLLIN, J., absent.

Judgment accordingly.

PIERCE v. EMERY

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE, 1856

(32 N. H. 484)

BILL IN EQUITY. The following facts appear from the statements of the bill.²

The Portsmouth and Concord Railroad, a corporation established under the laws of New Hampshire, made to the complainants, Joshua W. Pierce, Alfred W. Haven, Josiah G. Hadley and to Alexander Ladd, deceased, whose executrix, Maria T. Ladd, is the remaining plaintiff, sundry mortgages, dated respectively February 12, 1850, July 6, 1850, March 10, 1851, May 29, 1851, August 19, 1851, and March 3, 1852, and also made sundry other mortgages to Joshua W. Pierce and Alfred W. Haven, two of the complainants, dated respectively June 26, 1852, July 13, 1852, August 16, 1852, October 15, 1852, November 16, 1852, December 26, 1852, February 12, 1853, June 27, 1854, September 23, 1854, and April 12, 1855.

The mortgages were of personal property, and the bill set forth a description of it as contained in the different mortgages, and specified the debts and liabilities secured by each. By the first two mortgages, made prior to August 20, 1850, besides specific articles named in the mortgages, all the personal property of the railroad was mortgaged; and by the subsequent mortgages the furniture of the road, locomotives, cars, fencing stuff, fuel, and other personal property, were mortgaged from time to time, in some cases to secure debts that accrued before August 20, 1850, and in others, debts which accrued after that date; but none of

¹ Concurring opinion of CHASE, J., is omitted.

² This statement of facts has been abbreviated.

the mortgages were given on the sale of property to the road for security of the purchase money.

The mortgage of June 26, 1852, conveyed all the right, title and interest of the railroad to the railroad iron imported in the ship *General Berry*, then belonging to the road, subject to the lien of the United States for duties, being about 591 tons, to secure a note for \$10,000, dated April 26, 1852. . . .

The several mortgages under which the plaintiffs claim remain in whole or in part unsatisfied. All the property described in the mortgages made after August 20, 1850, was purchased by and came to the possession of the road subsequently to that date; and all the property named in the mortgages running to Pierce and Haven, with the exception of the iron, was paid for with money lent to the road by the parties named in those mortgages, as is stated therein. In all these mortgages it is stated that they were given for the security of the parties named in them respectively. All these mortgages were duly executed and recorded in Portsmouth, which was by law established as the place of business for the road. . . .

On the 13th of July, 1850, the Legislature of this State passed an act entitled "An act to aid the construction of the Portsmouth and Concord Railroad," authorizing the road to issue bonds to the amount of \$350,000, payable, with interest, in not less than ten, nor more than twenty years; the act to take effect when the stockholders should accept and adopt it. . . .

On the 3d of August, 1850, the stockholders met, accepted the act, and authorized the directors to appoint trustees, make a mortgage, and issue bonds at their discretion. On the 20th of August, 1850, the directors made a mortgage to Robert Rice, William Plumer, Jr., and Josiah Minot, trustees for those who were or should become holders of the bonds, to secure payment of bonds to the amount of \$350,000, issued the same day. The original trustees, by death and resignation, are now out of that office, and the defendants, James W. Emery, Thomas L. Tullock and Nathaniel White, are substituted by appointments made under the act and mortgage.

The mortgage deed to the trustees recites that the trustees had been appointed under the act to take and hold security on all the property of said company, and all its rights, franchises, powers and privileges, in mortgage and in trust, for the payment and security of whoever then or thereafter might become the lawful holders of said bonds, or any of them, and conveys to the trustees, in the

name of the Portsmouth and Concord Railroad, "the railroad of said corporation, together with all its rights, powers, franchises and privileges," in the towns in which it was laid out, "with all the lands, buildings and fixtures thereto belonging, or which might thereafter thereto belong, with all the rights, franchises, powers and privileges now belonging to and held, or which may hereafter belong to, or be held, by said corporation; together with the locomotive engines, passenger, baggage, dirt, freight and hand cars, and all the other personal property of said corporation, as the same now is in use by said corporation, or as the same may be hereafter changed and renewed by said corporation; to have and to hold the said railroad, franchises and estate aforesaid, whether real or personal, with all the privileges and appurtenances, legislative grants, powers, rights, and privileges, now or hereafter granted, thereto belonging," in trust for the bond-holders, and in mortgage for security of the bonds; and the trustees are empowered by the deed, on breach of the condition, to sell "the said railroad," and to make all necessary conveyances, "passing all the property, real, personal and mixed, rights, powers, franchises and privileges of this corporation," to the purchaser or purchasers.

On the same 20th of August the directors issued bonds to the amount of \$350,000, from which the road realized \$289,535, and no more. At that time the road owed about \$158,700, and have since expended in constructing and furnishing the road at least \$573,000, and of the debts then owing more than \$100,000 have been paid.

The condition of the mortgage to the trustees having been broken, the present trustees, Emery, Tullock and White, at the request of certain bond-holders, according to the terms of the mortgage, on the 14th day of May, 1855, applied to the directors to surrender to them all the mortgaged premises; and the directors by deed of surrender, dated May 31, 1855, surrendered and transferred to them all the property, rights, powers, franchises and privileges named in the deed of mortgage, to hold according to the terms and conditions thereof. The trustees have taken possession of the road, and under their mortgage claim the property mortgaged to the complainants; and the property has been delivered into the hands of the trustees, under an agreement that it should be used in operating the road, and a compensation paid for it.

The stockholders have voted that it is inexpedient to redeem the road and its property from the mortgage to the trustees, and under the provisions of the mortgage the trustees will be bound

to sell, in about eight months from the 31st of May, 1855, and they threaten to include in their sale the property mortgaged to the complainants.

The original trustees, when they took their mortgage, had notice of the prior mortgages, and also many persons who afterwards became purchasers and holders of the bonds.

The present trustees and the Portsmouth and Concord Railroad are the parties defendant to the bill.

The bill prays that the trustees may be decreed to pay the complainants the debt secured by their mortgage, before they sell the property mortgaged to the complainants, and be enjoined not to sell until they pay; or, if allowed to proceed with the sale, may be decreed to pay out of the proceeds the debts secured by the complainants' mortgage, for a foreclosure and for general relief.

PERLEY, C. J.¹ Corporations, as a general rule, have power to sell their property, real and personal, and to mortgage it for the security of their debts (Com. Dig., Corporation, F, 18; *Barry v. Merchants' Exchange Co.*, 1 Sand. Ch. 280; *Despatch Line of Packets v. Bellamy Manuf. Co.*, 12 N. H. 206).

Railroads, by the law of this State, are public corporations, so far as to be subject in many respects to general legislation and the control of the public authorities. They are created to answer a public object, and are bound to the State for the performance of their public duty. They can do no act which would amount to a renunciation of their duty to the public, or which would directly and necessarily disable them from performing it. They cannot convey away their franchise and corporate rights, nor perhaps the track and right of way which they take and hold for the necessary use of their road.

But they may contract debts; may purchase on credit; and we see nothing in the nature of their business, or in their relation to the public, which should prevent them from making a valid mortgage of their personal property, not affixed to the road, though used in the operation of it. Instead of disabling the road from performing its public duty, a mortgage might assist in doing it, in the same way that other corporations or individuals are aided in carrying on their business by mortgages of their property.

The two mortgages made to the complainants before the mortgage to the trustees for the bond-holders, we think are valid to hold the personal property specifically described in them for the security

¹ Portions of the opinion have been omitted.

of so much of the debts as remain unpaid. The bill does not state how much of those debts are still due. But the complainants have no right in the road by virtue of those mortgages; they must assert their security by taking the property away, as in the case of a mortgage by an individual.

A different and more difficult question arises as to the claim of the complainants under mortgages made after the 20th of August, 1850, the date of the mortgage to the trustees for the bond-holders.

The ground taken by the bond-holders is that the act of the Legislature authorized a mortgage, not only of the property which at the time belonged to the road, but of all the franchises and corporate rights of the road, and the road itself; that the trustees under such a mortgage would take, as security for the bonds, the railroad and all its franchises and rights, as one entire thing, and that, as incident to this mortgage of the road and its franchise, all the property, real and personal, which might at any time afterwards become vested in the road, would be covered by the mortgage, and held by the trustees, subject to the right in the directors, until breach of the condition, of managing the road for the benefit of all concerned, and of selling such of the property from time to time as might be convenient in the course of the business, provided they substituted other property of equal value; that when the trustees should make a sale under their mortgage, all the property, and all the franchises and corporate rights of the road would pass to the purchasers, subject in their hands to the public liabilities and duties of the corporation; that the mortgage deed in this case exhausts the powers conferred by the act, and covers the road and its franchises, and the accruing property, as an accession to the thing mortgaged and as part and parcel of it; that consequently the lien of the mortgage to the trustees attached upon property subsequently acquired immediately upon its vesting in the road, and the claim of the complainants must be postponed to the mortgage made for security of the bond-holders. Whereas, the complainants maintain that the act confers no power to make such a mortgage, and that the mortgage to the trustees does not cover property of the road subsequently acquired.

We take it to be a general rule of the common law that nothing can be mortgaged that is not in existence, and does not at the time of the mortgage belong to the mortgagor (*Tapfield v. Hillman*, 4 M. & G. 240; *Lunn v. Thurston*, 1 M., G. & S. 383; *Winslow v. Merchants' Ins. Co.*, 4 Met. 306; *Jones v. Richardson*, 10 Met. 488; *Moody v. Wright*, 13 Met. 17).

This rule, that a mortgage cannot cover future acquisitions, would seem to have been established on the technical ground that a mortgage is a sale upon condition, and by the common law there could be no sale of a thing not *in esse*, and not at the time the property of the seller.

By the civil law a mortgage may cover the future property of the mortgagor (Domat., part 1, book 3, tit. 1, § 1, articles 5 and 7). And in some jurisdictions where the maxims of the common law prevail, mortgages have been sustained covering the future and shifting stock of a trading or manufacturing establishment; as in the case of *Holly v. Brown*, 14 Conn. 255. So in *Abbott v. Goodwin*, 20 Maine, 408, a mortgage of a stock in trade and of the substituted goods was held to be valid. And such a mortgage was sustained against an assignee in bankruptcy in *Mitchell v. Winslow*, 2 Story, 630. In these cases, not merely the existing property, but also the business and establishment appear to have been regarded as the subjects of the mortgage; and the mortgagor, while he remained in possession, was looked upon in the light of an agent for the mortgagee, so far as his interest was concerned, with an implied authority to buy and sell, and manage generally, according to the usual course of the business.

Even where the strict rule against the mortgaging of subsequently acquired property is enforced, if the mortgage purport to cover such property, and the mortgagee take possession, with assent of the mortgagor, before another title attaches, he will hold from time to time, not as mortgagee, but as pawnee, under the contract contained in the mortgage (*Rowley v. Rice*, 11 Met. 333). And in mortgages of real estate it is a familiar rule that buildings, and other things annexed to land after the mortgage, are regarded as accessions to the original subject of the mortgage, and covered by it (*Pettingill v. Evans*, 5 N. H. 54).

There is, therefore, no intrinsic difficulty in a mortgage which should cover the future and shifting stock and property of a trading or manufacturing establishment, or of a corporation. But by the common law, according to the weight of authority in other jurisdictions, and as we understand the rule to be in this State, no mortgage can be made to cover any personal property, except specific articles belonging to the mortgagor at the time of the mortgage; and, unaided by the special act of the Legislature, the railroad in this case would have no power to make a mortgage that should have the effect contended for by the bond-holders. The question whether the trustees can hold subsequently acquired

property against the claim of the complainants, will, therefore, depend on the construction of that act and of the mortgage deed made under it. Did the act authorize the road to make a mortgage which should cover property of the road afterwards acquired? and if so, did the directors make such a mortgage in this instance?

The word "franchise," so often used in the act and in the deed, has various significations, both in a legal and popular sense. A corporation is itself a franchise belonging to the members of the corporation; and a corporation, being itself a franchise, may hold other franchises, as rights and franchises of the corporation. A municipal corporation, for instance, may have the franchise of a market, or of a local court; and the different powers of a private corporation, like the right to hold and dispose of property, are its franchises. In a more popular sense the political right of subjects and citizens are called franchises, like the electoral franchise (*Com. Dig.*, Franchise, F, I.; *Angell & Ames on Corp.* 3; *The King v. London*, *Skinner*, 310, 311).

A corporation, being itself a franchise, consists and is made up of its rights and franchises; and when all its franchises are gone, by surrender, by forfeiture judicially ascertained, by limitation of the grant, or in any other way, the corporation has no longer any practical existence. If the franchise or franchises are of a nature to continue after they are lost by the corporation, they may be regranted to another corporation, or to other individuals; but the former corporation is substantially dissolved (2 *Kent's Com.* 305, and note *a*, 308 and 309; *The King v. Pasmore*, 3 *T. R.* 199; *Com. v. Hancock Bridge*, 2 *Gray*, 59, 60).

The grant of a corporation is a contract between the State granting it and the grantees. It is peculiarly and emphatically so in the case of railroad corporations, which are created upon public considerations, and clothed with extensive and extraordinary powers, for the purpose of enabling them to accomplish the public object contemplated in the grant. The members and stockholders have private rights; but the corporations are also bound to the discharge of their public duties, and cannot, without the aid of special legislation, disable themselves from performing their duty to the public by alienating or transferring their corporate rights and franchises. They may sell or mortgage their personal property, but they cannot sell or mortgage with it the right to manage and control the road, nor any other corporate right or franchise (*The King v. The Severn & Wye R. W. Co.*, 2 *B. & Ald.* 646; *Reg. v. The Eastern Counties R. W.*, 10 *Adol. & Ellis*, 531; *Reg. v. South*

Wales R. W. Co., 14 Ad. & Ellis (N. S.), 902; *Clark v. Washington*, 12 Wheaton, 46, 54; *Winchester & Lexington Turnpike R. Co. v. Vimont*, 5 B. Monroe, 1; *Arthur v. The Commercial & R. R. Bank*, 9 S. & M. 394).

If this corporation had authority to make a mortgage that should convey the franchise and corporate rights, the power must be derived from the special act. It is a very familiar rule in the interpretation of statutes that all parts of the act must be considered together, and such construction given to it as will best answer the intention of the makers. To accomplish this object, in some cases the letter of the statute may be restrained by an equitable construction; in others, enlarged; and sometimes the construction may be even contrary to the letter (*Holbrook v. Holbrook*, 1 Pick. 250; *Somerset v. Dighton*, 12 Mass. 384). On examination of this act it will at once be seen that the several parts cannot all take effect in the sense that would most naturally belong to each, if they were considered separately. In the third section the directors are authorized to mortgage "the whole or a part of the real or personal estate of said corporation." Stopping here, and taking this clause by itself, no inference can be drawn from it of an intention to give the power of mortgaging the franchises or future acquisitions and accessions of personal or real estate. This is the clause in which the authority to mortgage is directly conferred. If a more extensive power were intended to be given by the act, why is no mention made of it here? The argument drawn from this part of the act against the construction contended for by the bond-holders, goes upon the ground that this clause was intended to include and define all the powers of mortgaging conferred by the act.

But by the same section the trustees are authorized to sell, according to the conditions and limitations that may be contained in the mortgage deed, "the real and personal estate, and all rights, franchises, powers and privileges named in said mortgage deed." The directors therefore are authorized to *name* in the mortgage deed, not only the real and personal estate, but rights, franchises, powers and privileges of the corporation. The rights and franchises named in the deed are to be disposed of by sale, to enforce the mortgage security in the same way with the property mortgaged; and there is nothing from which it can be inferred that the rights and franchises, and the property of the corporation, are not to be named in the same way and conveyed in the same way by the deed; that is to say, the rights and franchises are to be conveyed and mortgaged like the property, and are to be disposed of under

the mortgage for the same purpose, and in exactly the same manner. The directors may *name* in the mortgage—in other words, they may convey in mortgage—any part or all the real and personal property, and any or all the rights, franchises, powers and privileges of the corporation. The act sets no limit on their discretionary power in this respect; and whatever the directors *name* in the mortgage which they give in behalf of the road, is to be disposed of in the same way for the satisfaction of the mortgage debt, whether it be the property or the rights and franchises of the corporation. The power to mortgage the rights and franchises, as well as the property of the corporation, is plainly and necessarily implied from these provisions of the act.

The act, therefore, does not limit the power of mortgaging to real and personal property on hand at the time, but gives authority to mortgage the rights and franchises of the corporation, which could not be done without the aid of the act. And it cannot be maintained that the authority to mortgage real and personal property given in one part of the act, was intended to be exclusive of all further power, when the further power of mortgaging the rights and franchises of the corporation is clearly given by necessary implication in another part of the same section. . . .

The directors then had power under the act to name in their mortgage, and to convey in mortgage to trustees, all the property, and all the rights, franchises, powers and privileges of the corporation. If they made such a mortgage it would convey to the mortgagees all the right and power which the corporation had to acquire and hold property, for the power to acquire and hold property is one of the rights and franchises of the corporation. That right would be conveyed and transferred from the road to the trustees by the mortgage deed, in the same way that the property was conveyed and transferred, subject to the condition of the mortgage; and the subsequently acquired property would pass under the mortgage as incident to the right of acquiring and holding it, which would be vested in the trustees by the mortgage.

The purchasers under the deed of the trustees "acquire all the rights, franchises, powers and privileges which said corporation possessed, and the use of said railroad, with all its property and rights of property, for the same purposes and to the same extent that said corporation could use the same, if said deeds had not been made, subject to the same liabilities as to the use of said railroad that said corporation would be under if said deed had not been made." All this the purchasers take through a sale authorized to

enforce the mortgage security; and we cannot understand that anything different from this, or less than this, was authorized to be mortgaged and covered by the mortgage for the security of the mortgage debts. It is contrary to all the received notions of a mortgage that anything should be sold under it to pay the debts secured, that was not mortgaged and covered by it before the sale.

It would seem to be the plain intention of the act to preserve the corporate rights and franchises, and maintain the corporate liabilities in the hands of the purchasers at the trustees' sale. All the rights and franchises of the corporation, and the use of the road, are transferred to them by the deed of the trustees, and they hold the corporate rights and franchises, subject to the same liabilities as to the use of the road by which the corporation was bound before the sale. They have all the property and all the rights and franchises, and are likewise bound to perform all the public duties of the corporation. It is not easy to see how the original corporation, in the hands of the former corporators, could, after such a sale, have any practical or even legal and theoretical existence. They could hold no property; they could maintain no action, nor elect any corporate officer; these powers are all rights and franchises of the corporation, created and granted by the act of incorporation, and are all transferred and conveyed by the deed of the trustees to the purchasers under their sale. In some cases, after the franchises of a corporation are lost by forfeiture, the corporation is still held to exist in contemplation of law, so far as to be capable of being revived by a regrant from the government. But here the franchises would not be forfeited to the State, but transferred to the purchasers; and the State could not revive the old corporation by a regrant of the franchises, which had become vested in the purchasers. The sale would in substance transfer the road and the corporation to the purchasers.

There may be a difficulty, which it is not necessary to anticipate, in saying how the purchasers shall exercise some of these rights. There is no provision in the act for their doing it through the machinery of the old corporation. They may, perhaps, be regarded somewhat in the light of new grantees of the old franchises.

If, then, the purchasers under the trustees' sale take what was originally mortgaged, and take all the property, rights and franchises of the corporation, to hold and enjoy as the corporation held and enjoyed them, they take substantially the corporation itself; and the corporation itself was the thing originally mortgaged. . . .

An analysis of the act and an examination of the several parts, when taken together and compared with each other, lead to the conclusion that the Legislature intended to grant the power of mortgaging all the property and all the rights and franchises of the corporation, including the right to property subsequently acquired. We have not been able to discover anything in the act which directly contradicts, or by any necessary implication excludes this construction. There are express grants of particular powers in different parts of the act, from which the argument is drawn, that nothing more than is there expressed was intended to be granted elsewhere. For instance, in one clause authority is given to mortgage all or part of the real or personal property of the road. But it is quite plain from other provisions that this was not intended to be the limit of the authority conferred. The provisions for the sale and transfer to the purchasers under the mortgage of all the rights and franchises are practically inconsistent with such a narrowed construction of the act. The material and substantial provisions of the act cannot be carried into effect without construing it to give the power of mortgaging the road, and all its rights and franchises, as an entire thing, and subsequently acquired property, as an incident to the general subject of the mortgage, and an accession to it.

The general design and object of the act favor the same construction. The corporation already had power under the general law to mortgage their property then in possession, and for that purpose had no need of special legislation. The act must have intended to enlarge that power, and authorize the road to make a mortgage substantially different from such as are allowed at common law; and that intention would not be answered if the act should be so construed as to limit the power of mortgaging to property then owned by the road. The act is entitled "An act to aid in the construction of the Portsmouth and Concord Railroad." The road was unfinished, and the money borrowed on the security of the mortgage was to go into the road, to assist in the enterprise and undertaking. The statements of the bill show that at the time when the mortgage to the trustees was made, all the personal property of the road had been already mortgaged to these complainants for the security of other debts. There is nothing in the case which furnishes any ground to infer that the road had then any unincumbered property capable of being mortgaged. If so, and the mortgage to the trustees could attach on nothing but property then belonging to the road, all that the bond-holders

would have under their mortgage for security of their demands would be a right in equity to redeem property of the road already mortgaged for other debts. This, we think, is not the security upon which the bond-holders supposed they were lending their money, nor the security which the Legislature intended to give them by the act. The general design must have been to give those who advanced money to complete the road on credit of the mortgage specially authorized by the act, a substantial and available security, and a preference over other subsequent creditors.¹

But if all subsequently acquired property might be mortgaged to secure other debts, new and old, and those mortgages were upheld against the bond-holders, money might be obtained on such security to carry on the road, to pay interest on the bonds, or even to pay dividends, and when possession should be taken for the bond-holders, perhaps at the end of ten or twenty years, they might have little for their security but the franchise and road-bed; for much of the iron and other materials since affixed to the road are covered in terms by the complainants' mortgages, and claimed under them. If other creditors of the road had stood on such terms with the directors and managers as would enable them to obtain mortgages of the newly acquired property, as it fell from time to time into the hands of the corporation, the bond-holders, instead of having a preference, would have been the last creditors likely to realize anything from their security, in case the road should turn out to be insolvent.

The object of the act being to give the bond-holders a substantial and available security for their money, and a preference over other creditors not previously secured, can only be answered by so construing the law as to give the bond-holders security upon the road itself, as the general subject-matter of their mortgage, and upon the changing and shifting property of the road as part and parcel, by accession, of the thing mortgaged.

The question is certainly not free from difficulty; but whether we look to the particular provisions, or follow what we must understand to have been the general object and design of the law, we

¹ In *Morrill v. Noyes*, 56 Me. 458 (1863), the court said: "A large part of the numerous railroads in this country have been constructed by the aid of mortgages to individuals or to trustees. Many of these mortgages, perhaps most of them, embrace specifically, engines and cars,

to be subsequently acquired. As they are made to secure bonds not to be due for many years, and the rolling stock is perishable, unless such future acquisitions can be mortgaged, as incident to, and essential to the use of, the railroad itself, the security is liable to be greatly diminished."

are on the whole brought to the conclusion that it authorized the directors to mortgage, not only the property then belonging to the road, but all the franchises and rights of the corporation, and, in substance, the road and corporation itself. That if the directors made such a mortgage, as incident to the franchise and corporate rights mortgaged, subsequently acquired property, immediately upon its vesting in the corporation, would, as an incident and by accession, become part of the thing originally mortgaged, and of the mortgage security. The right to take and hold property being one of the franchises mortgaged, the corporation would have no power to take or hold property, except by virtue of that franchise and under the mortgage by which the franchise was covered.

We are of opinion, then, that the act authorized the corporation to mortgage the whole road as an entire thing, with all its corporate rights and franchises, and incidentally, and by way of accession, all the subsequently acquired property of the road. Did the directors in fact make such a mortgage? . . .

Taking the whole deed together the intention is very apparent to mortgage, not merely property then belonging to the road, but the road itself and all its franchises, as one entire thing, and, as an incident and accession, all property of the corporation afterwards acquired. And such we think was the legal operation of the deed under the act. . . .

The demurrer must be overruled, as it is taken to the whole bill, and the complainants are entitled to part of the relief for which they pray. The demurrer may, however, be amended so as to apply to part only of the bill, and the defendants answer to the residue.¹

¹ *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431 (1857), *accord*. See also *Dinsmore v. Racine & Miss. R. R. Co.*, 12 Wis. 649, 656 (1860); *Farmers' Loan & Trust Co. v. Fisher*, 17 Wis. 114 (1863), and *Pierce v. Milwaukee & St. Paul R. R. Co.*, 24 Wis. 551 (1869). But *cf.* *American Loan & Trust Co. v. General Elec. Co.*, 71 N. H. 192, 51 Atl. 660 (1901).

In *Howe v. Freeman*, 14 Gray, 566 (1860), the Supreme Judicial Court of Massachusetts sustained a mortgage of the road and property of a railroad "and all additions made thereto by adding new locomotives, cars, and other things," on the

ground of an express legislative ratification thereof. "This legislative act obviates the second objection to the right to maintain the action—that a mortgage will not pass chattels or personal property not in existence, or not owned by the mortgagor, at the date of the mortgage. The legal principles, stated by the defendant on this point, are entirely correct in reference to ordinary mortgages, and would have been fatal to this action if no legislative authority had intervened, ratifying and confirming this particular mortgage. But the statute did thus intervene, confirming the mortgage, and thus

PLATT v. NEW YORK & SEA BEACH RAILWAY CO.

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND
DEPT., 1896

(9 App. Div. 87)

APPEAL by the petitioner, August Meidling, as guardian *ad litem* of August Meidling, Jr., an infant, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the Clerk of the County of Kings on the 23d day of May, 1896, denying the petitioner's motion to vacate an order appointing a receiver and also a judgment entered in the action, or to modify the same.

This action was brought for the purpose of foreclosing a mortgage executed by the New York & Sea Beach Railway Company. On January 11, 1896, the plaintiffs in this action procured an order appointing a receiver of said company, and of all the property then owned by it. Subsequently a judgment of foreclosure was entered by which the receivership was continued and a sale directed of all the property in the receiver's hands. Thereupon the appellant, who is a judgment creditor of the New York & Sea Beach Railway Company, instituted this proceeding for the purpose of having the order appointing the receiver and the judgment of foreclosure and sale so modified as to affect only such property as the mortgagor had when the mortgage was executed.

HATCH, J. The validity of the mortgage is not controverted. But it is claimed that under it no lien was acquired upon the personal property purchased subsequent to its execution, as against the petitioner therein. That the lien should attach to after-acquired property is within the express terms of the mortgage, and it is not disputed that such is its effect as between the parties thereto.

giving effect to all parts of it, including the provision as to after acquired machinery and cars. This mortgage was duly recorded, and thus, by means of the record and the statute, the lien thereby created was duly notified to all persons having business relations with the Vermont and Massachusetts Railroad Company."—*Per* DEWEY, J.

The matter is now regulated by general statute in Massachusetts (Mass. Pub. Stat., 1882, Ch. 112, § 72). See *Federal Trust Co. v. Bristol County Street Ry. Co.*, 222 Mass. 35 (1915). So in several other States (Conn. Gen. Stat., 1888, § 3572; Minn. Gen. Stat., 1894, § 2724).

By the provisions of the statute (Laws 1850, c. 140, § 28, subd. 10), authority was conferred to mortgage the corporate property and franchises for the purpose of completing, furnishing or operating the railroad. And this authority has been continued in the same language under the revision of the railroad law (Laws 1892, c. 676, § 4, subd. 10). The statute contemplates that it may be necessary to borrow money for the purpose of the physical creation of the road and putting it in operation. It is quite evident that in the accomplishment of this purpose property would be created and acquired that had no actual or potential existence at the time when the loan was made and the mortgage given. It is the usual course of procedure in the construction of a railroad that money is raised by mortgage on its property, and that the structure is built and operated to a large extent by means of the loans thus obtained, and much of the property is created and acquired after the loan is made. The statute makes no distinction between property necessary for the completion and furnishing of the road and that which is essential to its operation. By the terms of the law, therefore, it was contemplated that, for the money thus obtained the property acquired should be pledged as the security for its repayment, and this cannot be accomplished without holding that the lien of the mortgage attaches to such property as shall be necessary for that purpose, whether it is in existence at the time when the mortgage is given or is subsequently acquired and whether such property be such as is denominated real or personal. So it was early held that such a mortgage created in equity a lien upon property subsequently acquired superior to the lien of a subsequent incumbrance by mortgage or judgment (*Seymour v. Canandaigua & Niagara Falls R. R. Co.*, 25 Barb. 284; *Benjamin v. Elmira, Jefferson & Canandaigua R. R. Co.*, 49 *id.* 447; *Stevens v. Watson*, 4 Abb. Ct. App. Dec. 302). In those cases the question arose respecting liens upon subsequently acquired real property. But the discussion shows that the court considered the rule applicable as well to personal as to real property. Such has been the uniform rule applied in the Federal courts (*Mitchell v. Winslow*, 2 Story, 630; *Central Trust Co. v. Kneeland*, 138 U. S. 419).

The difficulties which have arisen relate not so much to the recognition of the mortgage as a lien, for the doctrine of the above-cited cases has never been questioned, but rather to the steps necessary to be taken to evidence the lien. The first debate arose over the question whether the rolling stock and equipment of the road retained its character as personal property, and if so, was it requi-

site that the mortgage should be filed as a mortgage of chattels. The Supreme Court divided upon the question, and decisions were rendered both ways. The Court of Appeals, in *Hoyle v. Plattsburg & Montreal R. R. Co.*, 54 N. Y. 314, settled the question by holding that it was personal property,¹ and that the mortgage covering it must be filed as a mortgage of chattels, as prescribed by the act of 1833, or the same would be void as against the general creditors of the corporation. To meet this conclusion, the Legislature, in 1868, passed an act (Laws of 1868, c. 779), providing that it shall not be necessary to file such mortgage, as a mortgage of chattels when it covers real and personal property and is recorded as a mortgage of real estate in each county in or through which the railroad runs. By this act the status of such property, so far as it relates to liens by way of mortgage is made practically subject to the same rules and is placed upon the same footing as real property. The business carried on by railroads, the great extent of territory which they cover, and the fact that the rolling stock is at all times widely distributed, not only throughout the State through which its lines mainly run, but also throughout the different States of the Union, create an essential difference between it and property whose *situs* is practically fixed. This, coupled with the necessity which exists for certainty of securing to those advancing money, usually in very large amounts, upon the faith of railroad property and the practical difficulty, if not impossibility, of a railroad being able to realize upon its property in this manner, if the technical rules respecting liens upon personal property should obtain, evidently created an intent in the mind of the Legislature to make such property subject to the same rules, so far as practicable, as apply to liens upon real property. It is quite evident that if it should be held necessary to constantly revise such a mortgage, in order to cover what has been, it may be, purchased by the money advanced or to supply operating needs and replenish what is destroyed, it would render such security so doubtful and precarious as not only to impair, but to practically destroy its value. We can see no reason for drawing a distinction in this regard between real and personal property. On the contrary, as the authority for the mortgage of both is derived from the same source, and the same reasons exist why both should be available and answerable as security, we think it more in harmony with the legislative intent to subject it to the same rules (*N. Y. Security Co. v. Saratoga Gas Co.*, 88 Hun, 569). This view does not bring us in conflict with

¹ See *Morrill v. Noyes*, 56 Me. 458 (1863).

R. D. Co. v. Rasey, 142 N. Y. 570. That case proceeded from the well-settled legal rule that a mortgage of chattels, having no actual or potential existence when the mortgage was given, is void as to intervening creditors. For reasons already stated that rule has no application to a mortgage of this character.

It follows that the order appealed from should be affirmed.¹

Order affirmed.

¹ Affirmed by the Court of Appeals, on opinion below, 153 N. Y. 670 (1897).

See, also, *New York Security Co. v.*

Saratoga Gas & Elec. L. Co., 159 N. Y. 137 (1899), discussing a corporate mortgage on future earnings and products.

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CHAPTER I. (*Continued*)

SECTION III.—INFORMAL MORTGAGES—EQUITABLE LIENS

RUSSEL *v.* RUSSEL

COURT OF CHANCERY, 1783

(1 *Brown Ch.* 269)

A LEASE having been pledged by a person (who afterwards became a bankrupt) to the plaintiff, as a security for a sum of money lent to the bankrupt, the pledgee brought this bill for a sale of the leasehold estate.

Mr. Lloyd, for the plaintiff, merely stated the case, and that the plaintiff had a lien upon the estate.

Mr. Kenyon, for the defendants, the assignees, insisted the plaintiff's claim was against the law of the land; for that it would be charging land without writing, which is against the 4th clause of the Statute of Frauds.

LORD LOUGHBOROUGH. In this case it is a delivery of the title to the plaintiff for a valuable consideration. The court has nothing to do but to supply the legal formalities. In all these cases the contract is not to be performed, but is executed.

LORD ASHURST. Where the contract is for a sale, and is admitted so to be, it is an equivocal act to be explained, whether the party was admitted as tenant or as purchaser. So here it is open to explanation, upon what terms the lease was delivered.

A question arose as to reading the bankrupt's evidence, he having had his allowance and certificate, but the Court suffered it to be read, thinking him not bound to refund.

An issue was directed to try whether the lease was deposited as a security for the sum advanced by the plaintiff to the bankrupt.

Upon the trial the jury found it was deposited as a security.¹

¹ "The case of *Russel v. Russel* is a decision much to be lamented; that a mere deposit of deeds shall be considered as evidence of an agreement to make a mortgage. That decision has led to discussion upon the truth

and probability of evidence which the very object of the Statute of Frauds was entirely to exclude."—*ELDON, L. Ch., in Ex parte Haigh*, 14 Ves. 402.

Rockwell v. Hobby, 2 Sandf. Ch.

STODDARD v. HART

COURT OF APPEALS OF NEW YORK, 1861

(23 N. Y. 556)

APPEAL from Supreme Court. The action was to restrain the foreclosure by advertisement, and to compel the cancellation of a mortgage held by the appellant against one Spicer. The trial was before a referee, who found these facts: On the 4th of March, 1852, Spicer procured from the defendant, on the security of the bond and mortgage in question, an advance of \$200 on lumber to be thereafter furnished. The mortgage was recorded on the 8th of March, 1852.

The original condition of the bond and mortgage was for the payment of \$200 and interest on the 15th of June, 1852. At the time the \$200 was advanced, it was agreed between the parties that if Spicer should want more money, the defendant would advance it, and for the purpose of securing it, the amount of such further advance should be inserted in the bond, with the parol agreement that the mortgage should be considered as security for what was thus inserted. Accordingly, within ten days after the mortgage was given, Spicer applied for and obtained from the defendant a further advance of \$180, inserting at the same time in the bond a further condition for the payment of that amount, with interest,

(N. Y.) 9 (1844); *Hackett v. Reynolds*, 4 R. I. 512 (1857); *Griffin v. Griffin*, 18 N. J. Eq. 104 (1866); *Gale v. Morris*, 29 N. J. Eq. 222 (1878), *accord*. *Contra* are *Shitz v. Dieffenbach*, 3 Pa. St. 233 (1846); *Meador v. Meador*, 3 Heisk. (Tenn.) 562 (1871). The cases in the United States are few and it may be doubted if the doctrine will have much following here. In several Western States the deposit of School Land Certificates, which pass title by assignment, has been held to create an equitable lien. See *Mowry v. Wood*, 12 Wis. 413 (1860); *Jarvis v. Dutcher*, 16 Wis. 307 (1862).

In *Ex parte Kensington*, 2 V. & B. 79 (1813), the original equitable mortgage arising from the deposit of

title deeds as security was allowed by Lord ELDON to be enlarged in amount by subsequent oral agreement without the return and re-deposit of the title deeds. This was, of course, an extension of the anomalous holding of the principal case.

In *Ex parte Hooper*, 1 Meriv. 7 (1815), the legal estate was assigned by way of mortgage, and Lord ELDON held that the legal mortgagee with title in himself could not enlarge the amount by subsequent parol agreement. Lord ELDON took occasion to state that "the cases on this subject have gone too far already, and I would be understood as saying that I will not add to their authority."

on the 1st of June, 1852. The mortgage, which had been in the meantime recorded, was conditioned for the payment of \$200 and interest, with the additional clause: "According to the condition of a certain bond obligatory bearing even date herewith."

On the 12th of July following, Spicer was indebted to the respondent, Stoddard, in the sum of \$500, for rent due and to become due, and with full and specific information from Spicer of all the foregoing facts, Stoddard took a subsequent mortgage on the premises for the amount of his debt; and afterwards, in January, 1853, he obtained from Spicer a deed of the property, which was received in satisfaction of his mortgage.

On the 25th of February, 1853, the defendant commenced a foreclosure by advertisement, claiming the amount due to be \$380, with interest. The plaintiff, on the 1st of March, tendered as the amount due, the sum of \$200, with interest and costs, and demanded a satisfaction piece, which the defendant refused. The referee decided that the defendant had no lien on the premises except for the \$200 and interest, and that the mortgage should be cancelled on payment of that amount, with costs.

The judgment entered upon the referee's report was affirmed on appeal at general term in the Eighth District, and the defendant appealed to this court.

COMSTOCK, Ch. J. In a loose and general sense the equity of this case is on the side of the defendant, because he made the subsequent advance of \$180, it being agreed that this, as well as the original sum of \$200, should be considered as secured by the mortgage. The question, however, is, whether the rules of law will give that effect to the transaction.

It will be convenient first to determine the legal construction and effect of the mortgage, unaided by the parol facts, but read in connection with the bond to which it is collateral. On the part of the defendant it is contended that the two instruments, constituting, as they do, a single security, are to be read as one; and, therefore, that the new advance, being written in the condition of the bond, is it to be deemed actually incorporated in the condition of the mortgage also, so as to render the latter a legal security for both the sums in question. This proposition does not require, nor does it admit, any aid from the understanding of the parties derived from the extrinsic evidence. If it be a sound one, it is universally sound; so that, if a bond be given for \$2000 actually loaned, and a mortgage collateral thereto be given for \$1000, the

latter is always to be read and construed as a security for the larger sum. The instrument being legally perfect, there is no occasion to reform it, or to involve the doctrine of equitable lien, or specific performance, or any kindred doctrine of equity.

I think this proposition cannot be maintained. A bond and mortgage are two instruments, although one may be collateral to the other. The one is a personal obligation for the debt; the other creates a lien upon land for the security of that debt, and it may well be for a portion of the debt instead of the whole. If the personal obligation expresses two sums, and the collateral instrument expresses only one of them, I see no reason why each should not be construed according to its own terms. So, if the condition of a bond be for a larger, and that of the mortgage be for a smaller sum, the obvious effect of both the instruments is that the maker binds himself generally for the whole debt, while he specially pledges the mortgaged land for only a given part of it. In this case the written condition of the bond is to pay the \$200, and the further sum of \$180; while that of the mortgage is only to pay the \$200. Each instrument is perfect, and each admits of a plain construction and effect according to its own language. If we do not look outside of them, there is no ambiguity. A debt was created, consisting of two sums. The land was mortgaged for one of those sums only.

In the next place, if the doctrine were admitted that a mortgage passes the freehold or legal estate in lands, it would probably follow that a parol agreement that the security should stand for a new advance would be good against the mortgagor or any one claiming under him not having the rights of *bona fide* purchasers. The title being conveyed by the instrument, the equities of the parties might be adjusted or modified by any new agreement without a writing. But it is entirely settled with us that such is not the nature or effect of a mortgage. With us a mortgage is a lien or security only, and not in any sense a title (*Kortright v. Cady*, 21 N. Y. 343, and cases cited). This ground of sustaining the defendant's lien for the additional advance, therefore, cannot be maintained. The defendant has no title to the land in question; and we have already seen that he has no legal mortgage for a greater sum than \$200.

At the commencement of this suit the defendant was proceeding to foreclose his mortgage, by advertising to sell the premises under the power of sale contained in the instrument; and he claimed in his notice both the sums of money in question. The

plaintiff, before instituting the suit, tendered the sum of \$200 secured by the mortgage, according to its terms, with the interest, and the costs which had accrued. From what has been said, it follows that this tender extinguished the lien and the power of sale, and that a sale afterwards made under the power would be a nullity (*Kortright v. Cady, supra*). Of course, we now speak of the lien as a legal one, expressed in the mortgage, and having no other existence.

It is claimed, however, that the defendant acquired some equitable lien or right to charge the new advance upon the land, and that, although such a lien or right cannot be enforced in the manner attempted, because there is no legal power of sale to enforce it, yet, as the plaintiff asks the interference of a court of equity, he must do all that equity requires as the condition of relief; in other words, he must offer to pay the whole debt in specie to the plaintiff. The argument may be sound if the defendant did acquire any such equitable title or right; and this is the next subject of inquiry.

In England it has long been held that a deposit of title deeds by a debtor with his creditor is evidence of a valid agreement to give a mortgage, which agreement is enforced by treating the transaction as an equitable mortgage. It has always been admitted by English jurists that this doctrine contravenes the statute of frauds, although it has become well settled in the jurisprudence of that country (4 Kent, Com. 151). It is confined there to the precise case of a deposit of title deeds. A mere parol agreement to make a mortgage, or to deposit deeds, does not create an equitable lien. In this State the doctrine is almost unknown, because we have no practice of creating liens in this manner. Equity, however, here as well as there, does sometimes specifically enforce parol agreements which are within the statute of frauds; and I see no reason to doubt that such an agreement to make a mortgage may be enforced when money or value has been parted with on the faith of it, and the circumstances are such as to render it inequitable to refuse the relief. But, in the present case, the precise difficulty is in the absence of any such agreement. The defendant had loaned \$200, and held a mortgage for that amount. He then advanced another sum: but there was no agreement to make another mortgage, or to change, in any respect, the terms of the one already made. The additional sum was inserted in the bond, with an understanding thereby that the mortgage should be "considered" as a security for that sum also. The instrument, as it was made, was a plain security for \$200; and no change in its terms was con-

templated. Nor is there the least pretence that any writing was to be executed creating a special security for the new advance. Now, a loan of money, with a mere understanding that the land of the borrower is a security for the debt, does not create a mortgage, legal or equitable. If it be specifically agreed to execute a legal mortgage, a very different question arises. The deposit of title deeds is evidence of such an agreement. But here there was no agreement to do anything which was not actually done. Consequently, if enough was not done to create a mortgage, then none was created. There is no room for the doctrine of specific performance, because there is nothing unperformed. The parties may have misunderstood the effect of what they did; but nothing in the transaction was left unfinished of which equity can now decree the complete execution. The question, then, is upon the legal interpretation and effect of the acts done, which, as we have seen, failed to create a lien. The understanding and belief of the parties do not change the law.

For analogous reasons I do not see that the defendant can derive any aid from the doctrine of reforming contracts in equity. If a writing does not truly express the agreement of the parties; if anything was omitted which was agreed to be inserted; or if anything be inserted contrary to their intention, equity will relieve against the mistake by reforming the contract. But in this case no mistake is alleged or proved. Everything agreed upon was done. The subsequent advance of money was to be inserted in the condition of the bond, and it was inserted accordingly. There was no agreement to make a new mortgage, or to change the terms of the existing. It is said the understanding of the parties was that the mortgage should secure this advance also; but it is not pretended that this understanding was to be expressed in any form of writing. If A. should loan money to B., and take a bond with the understanding that the farm of the latter should be considered a security, but with no intention or agreement to make a mortgage or writing of any sort, as the law requires, in order to create a lien, none would be created at law or in equity. The transaction, in judgment of law, would amount simply to a loan upon the bond of the borrower. Such, I think, in substance, was the transaction in question. There was no mistake, unless it be in misunderstanding the legal effect of what was said and done. But even this is not alleged. It is not stated or proved that the parties believed or understood that the insertion of the new loan in the bond had the effect in law of enlarging the mortgage also.

Will a court of equity, then, make a new contract for parties in order to effectuate a mere understanding where no agreement is pretended different from the one which the writing already expresses, and where there are no circumstances of surprise, imposition, fraud or misplaced confidence? To do so, I think, would be taking a step in advance of the settled rule on the subject, especially if the relief sought be in direct opposition to the statute of frauds. In the case of *Hunt v. Rousmaniere's Executors*, 1 Peters, 1, the general intention of the parties was to effect a security upon a ship at sea equivalent to a mortgage or bill of sale. With that design, a power of attorney to sell was executed, which, as they understood and were advised, accomplished the object in view. As a power merely, the instrument was revoked by the death of the party who signed it, and a bill was filed to reform the writing so that it might stand as a security according to the intention. It was adjudged, in the Supreme Court of the United States, upon the fullest consideration, that the bill could not be maintained—the ground of decision being that the court could not make an agreement of a different tenor and effect from the one which the parties themselves had intentionally entered into. The case before us seems to me still weaker in its circumstances, because not only was there no agreement for a better security than the defendant actually received, but it does not even appear that he acted under any mistake as to the legal effect of the transaction. The new advance of money was inserted in the bond; but there is no pretence of a belief that this in any respect affected the mortgage. There was a parol agreement that the mortgage should be considered as a security also for the sum thus inserted. The other party might give effect to this agreement in any suit or proceeding against him to foreclose, if he voluntarily chose to do so. But it is not alleged that, under a mistake even of the law, this agreement was supposed to be of any binding force or effect. On the whole, I am of opinion that the defendant's lien, whether viewed at law or equity, was only for the original sum of \$200, and, consequently, that the judgment of the court below is right. —Davies and Mason, JJ., dissented; Hoyt, J., did not sit in the case.

Judgment affirmed.¹

¹ Where the extension of the mortgage security is in writing, see *Butts v. Broughton*, 72 Ala. 294 (1882).

BOGERT v. BLISS AND ROBERT

COURT OF APPEALS OF NEW YORK, 1896

(148 N. Y. 194)

✓ APPEAL from order of the General Term of the Court of Common Pleas for the city and county of New York, made June 3, 1895, which reversed an order of Special Term confirming the report of a referee in proceedings for the distribution of surplus moneys arising from the sale of mortgaged premises in an action of foreclosure, modified and confirmed as modified said report, by finding that the equities of the claimant Bliss were superior to those of the claimant Robert; that the lien of the deed or mortgage to the claimant Bliss was superior to any claim of the claimant Robert, and that the defendant Bliss was entitled to payment out of the surplus moneys, the balance, if any, to be paid to the defendant Robert.

The facts, so far as material, are stated in the opinion.

ANDREWS, Ch. J. The controversy relates to the disposition of surplus moneys arising on a foreclosure of a mortgage. One Robert claims a prior lien thereon as assignee of a mortgage made by the defendant Striker to one Weil, dated May 15, 1891, payable June 18, 1891, for \$1000, recorded May 18, 1891. The mortgage was paid at maturity by Striker, the mortgagor and owner of the equity of redemption, to Weil, the mortgagee, who on the same day executed and delivered to Striker a satisfaction of the mortgage, together with the bond, but the mortgage was then in the register's office and for that reason was not delivered to Striker. The mortgage was paid in usual course, and at the time of the payment there was, so far as appears, no intention on the part of Striker, and no understanding between him and the mortgagee, that the mortgage should be kept alive. Subsequently, on July 2d, 1891, Striker applied to Robert (a partner of Weil) for a loan of \$1000, on the security of this extinguished mortgage, and the loan was made, Striker delivering to Robert at the time the bond and the satisfaction, and stating that Weil would assign the mortgage to him. The assignment was subsequently made, but not as we infer until after the mortgage executed to Bliss, the other claimant of the surplus. The Bliss mortgage was executed by Striker to Bliss August 28th, 1891, and covered the same premises embraced in the Weil

mortgage, and was given to secure a loan of \$1500 made by Bliss to Striker, but in form was an absolute deed, and was recorded November 11th, 1891. Bliss when he took his mortgage made no search of the title and had constructive notice only of the Weil mortgage. The question is whether Robert or Bliss is entitled to the surplus moneys. We think the conclusion of the General Term that Bliss is entitled to them is correct.

The Weil mortgage was extinguished by payment before Striker applied to Robert for a loan, and Robert had notice that the mortgage had been paid by Striker. Striker delivered to him the satisfaction executed by Weil, and there is no pretence that it did not represent the actual fact that Striker had paid the mortgage. What Striker undertook to do was to re-issue the mortgage and the bond to secure another loan equal to the amount of the mortgage. Robert assented to this proposition and made the loan on the faith of the proposed security. But there was no writing and no actual assignment of the mortgage until after Bliss had taken his mortgage. All that Robert had until the assignment was made was the possession of the bond and the satisfaction of the mortgage and the verbal agreement of Striker that the mortgage should be assigned.

In this State a mortgage is a lien simply, and the general principle is well settled that on payment the lien is *ipso facto* discharged and the mortgage extinguished. There are many cases where, for purposes connected with the protection of the title or the enforcement of equities, what is in form a payment of a mortgage, will be treated as a purchase, so as to preserve rights which might be jeopardized if the transaction was treated as a payment. But we know of no principle which permits a mortgagor who has paid his mortgage and taken a satisfaction, there being at the time no equitable reason for keeping it afoot, subsequently to resuscitate and re-issue it as security for a new loan or transaction and especially where the rights of third parties are in question. It would make no difference in our view whether the re-issue of the mortgage was before or after new rights and interests had intervened. We do not speak of the position of a subsequent grantee or mortgagee having actual notice of the re-issue of a satisfied mortgage before he takes his mortgage or deed. It is possible that the circumstances of the re-issue may be such as to furnish ground for a court of equity to intervene and compel the execution of a new mortgage, to accomplish the real purpose of the parties, and notice of such circumstances to the subsequent grantee or mortgagee

might, perhaps, under special conditions, subject his right to the prior equity. But the contention that a person having at the time notice that a mortgage had been paid by the mortgagor in usual course, can, by a verbal arrangement between himself and the mortgagor, give the extinct mortgage vitality again as security for a new loan, so as to give it priority over a subsequent conveyance or mortgage is not justified by the authorities in this state.

The Statute of Frauds does not permit mortgages on land to be created without writing. The re-issue of a dead mortgage, if effect is given to the transaction, is in substance the creation of a new mortgage. If this was permitted it would furnish an easy way to evade the statute. The law wisely requires that instruments by which land is conveyed or mortgaged should be executed with solemn forms, and that their existence should be made known through a system of registry so as to protect those subsequently dealing with the premises. Public policy requires that dealings with land should be certain, and that transactions affecting the title should be open, and that secret agreements should not be permitted by which third persons may be misled or deceived. It would be a convenient cloak for fraud if a mortgagor, having paid a mortgage, could retain it in his possession uncanceled of record and reissue it at pleasure. A party taking from a mortgagor a re-issued mortgage has notice which should put him upon inquiry, and he takes at the peril that it has in fact been paid.

In the present case, not only had the mortgage been paid before Robert made his loan, but he knew the fact from incontestable evidence. If he had received an actual assignment before Bliss had taken his mortgage, he would not, we think, have been entitled to preference. Upon the facts actually existing he had merely an agreement for an assignment, which at most created an equity enforceable by equitable action, and meanwhile Bliss had obtained a legal mortgage, having no notice of the agreement. Bliss had constructive notice of the mortgage to Weil. His mortgage was subject to that incumbrance unless the mortgage had been paid. But he did not take subject to an arrangement between Striker and Robert to revive the mortgage, the lien of which had been extinguished by payment. The case of *Mead v. York*, 6 N. Y. 449, is a direct authority upon the question here presented. It was there held that a mortgage after being once paid by the mortgagor cannot be kept alive by a parol agreement as security for a new liability incurred for the mortgage as against the latter's subsequent

judgment creditors. (See, also, *Cameron v. Irwin*, 5 Hill, 272; Jones *||* on Mortgages, § 943 and cases cited.) . . .

We find no case which sustains the claim that a mortgage paid by the mortgagor, not intended to be kept alive at the time of the payment, can be thereafter re-issued by him to secure another loan, made by a party cognizant of the fact, so as to give it validity as against a subsequent purchaser or mortgagee.¹

The order of the General Term should be affirmed.

All concur, except Vann, J., not sitting.

Order affirmed.

CHASE v. PECK

COURT OF APPEALS OF NEW YORK, 1860

(21 N. Y. 581)

APPEAL from the Supreme Court. Ejectment for one hundred acres of land in Otsego County. The plaintiff made title under a sheriff's sale, made June 12th, 1849, upon execution on a judgment against Alonzo Aylesworth, which became a lien on the land in question on the 31st of May, 1848. On the trial it was proved that Alonzo Aylesworth acquired title to the land by deed, from Isaac Howland and Sarah his wife, dated August 11, 1843. On that day they, being very aged persons, conveyed the land to Aylesworth (who was their grandson) for the nominal consideration of one dollar. Nothing was paid in fact, but contemporaneously with the execution of the deed, Aylesworth gave back a writing not under seal, by which he certified that "the said Alonzo hereby pledges the entire use of the farm, this day conveyed to him, for the support of said Isaac and Sarah, and agrees to furnish all necessary support—such as victuals, clothing, medical aid, and all other necessary comforts of life—for both the said Isaac and Sarah; and agrees and binds himself to treat them kindly and wait upon them attentively and in a careful manner, during their natural lives and during the life of the longest liver of them, and should the produce of the farm be insufficient for that purpose, then the entire fee shall be appropriated for that purpose."

Aylesworth had been brought up by the Howlands, and was in his minority at the date of the above conveyance and agreement.

¹ On revival of extinct mortgage by writing, see *Peckham v. Haddock*, 36 Ill. 39 (1864).

They lived together upon the farm, Aylesworth managing it and providing for the support of his grandparents until after the death of Isaac Howland, in 1846. He then became involved in debt, and on the 29th of May, 1848, being insolvent, and several suits against him proceeding to judgment, he reconveyed the premises to Sarah Howland. No other consideration for the reconveyance was shown than that to be implied from the agreement of Aylesworth to support Mrs. Howland and his inability to perform it. The plaintiff claimed that the reconveyance was in fraud of creditors, and there was evidence warranting the jury in finding that an actual fraudulent intention to keep the property from the reach of creditors was a leading motive for the reconveyance. Mrs. Howland lived upon the proceeds of the farm, a fair rent for which was shown to be some \$60 per annum, until she sold it in 1849 to a grantor of the defendant; neither Aylesworth, nor any person in his behalf paying anything, or rendering any service toward her maintenance. She died after the commencement of this suit and before the trial. The jury found a verdict for the plaintiff, and the judgment thereon was affirmed at general term in the sixth district. The defendant appealed to this court, where the case was submitted on printed arguments.

DENIO, J. The determination of this case will depend upon the character of, and the effect to be attributed to, the instrument executed by Alonzo Aylesworth to Isaac and Sarah Howland, at the same time that the latter conveyed to him the premises in controversy. From the two papers, taken together, it is apparent that it was parcel of the consideration, upon which the conveyance was executed, that Aylesworth, the grantee, should support the grantors during their joint and several lives. The paper signed by him professes, in the first place, to pledge the entire use of the farm for that purpose; and it is added that, if its produce shall be insufficient for the object, the entire fee shall be appropriated to accomplish it. It was, probably, intended that the transaction should operate, to a certain extent, as a gift; but this was only so far as the value of the property conveyed should exceed the value of the return which was to be made for it. As respected the latter, the arrangement was a contract, which imposed a certain duty upon the grantee, to be performed for the benefit of the grantors, and which, moreover, attempted to create a lien upon the subject of the conveyance, to secure the performance of the duty undertaken by the grantee. The intention of the parties is plain; but the question to be con-

sidered is, in what legal or equitable light the arrangement is to be regarded by the court. In our opinion, the instrument signed by Aylesworth is to be considered as creating an equitable incumbrance in the nature of a mortgage.

By the law of England, as administered in the Court of Chancery, an equitable mortgage may be created by any writing from which the intention to create it may be shown; or it may be effected by a simple deposit of title deeds without writing.¹ It will also be allowed in favor of a vendor, for unpaid purchase money, or of a purchaser who has advanced his money on the faith of a contract for a conveyance (Miller on Equitable Mortgages, pp. 1, 2, 218, and cases cited).

The courts of equity in this State have adopted the general doctrines of the English Chancery upon this subject, as upon many others. The cases of a mortgage created by a writing not sufficient to convey the premises, or by a deposit of title deeds, have not been frequent with us; but the doctrine has been applied in a few instances, and I do not find any judgment or *dictum* by which it has ever been questioned. In *Jackson v. Dunlap*, 1 John. Ca. 114, a vendor of land had executed and acknowledged a conveyance to the vendee, but a part of the purchase money had not been paid, and it was then agreed that the grantor should retain the deed until the balance should be actually paid. It was equivocal upon the testimony whether the deed had been delivered so as to pass the title or not. If it had not been, the question we are considering would not arise; but Kent, Ch. J., considered the delivery complete, and that the deed was then retained by the grantor by way of security, till payment. This, he said, was the creation of an equitable lien in the grantee. The other judges seem to have been of opinion that the title did not pass. In *Jackson v. Parkhurst*, 4 Wend. 369, it was held by the court, Judge Sutherland giving the opinion, that the pledge or deposit of a deed with the grantor, by way of security, would give him a lien in the nature of a mortgage; but the case being at law, it was held that such a title could not be set up against the legal estate. In *The Matter of Howe and Wife*, 1 Paige, 125, the English doctrine, that an agreement for a mortgage is in equity a specific lien on the land, was asserted and applied by Chancellor Walworth.

The cases in which a lien for the purchase money has been estab-

¹ This language was applied by the court in *Allis v. Jones*, 45 Fed. 150 (1891), where the corporate seal on a

mortgage was omitted. See, also, *Love v. Sierra Nevada Min. Co.*, 32 Cal. 639 (1867).

lished, where the title had passed to the purchaser, are more numerous (*Garson v. Grear*, 1 J. C. R. 308; *Warner v. Van Alstyne*, 3 Paige, 513; *Arnold v. Patrick*, 6 Paige, 310; *Hallock v. Smith*, 3 Barb. S. C. R. 267). These cases proceed upon the same principle which the defendant seeks to establish. The difference in circumstance which exists in the present case is against the plaintiff; for Mr. and Mrs. Howland received back from Aylesworth a written instrument, in which the lien reserved was explicitly stated, while, in the cases referred to, the lien was predicated on the implied intention of the parties without a writing or even a verbal agreement for that purpose. Another example of the same doctrine is furnished where there is an executory contract for the purchase of lands, the title remaining in the vendor; and subsequently to the contract he suffers liens upon the premises to be created. It is well settled that the interest of the vendee will be protected against every one but a *bona fide* purchaser or incumbrancer who has advanced money or property without notice of the vendee's equity (*Lane v. Ludlow*, 6 Paige, 316, note; *Parks v. Jackson*, 11 Wend. 442). In such cases, the vendee is considered in equity as the owner, and the vendor as his trustee.

Assuming that it has been shown that Sarah Howland occupied the position of a mortgagee of the land to secure the agreement of Aylesworth to support her during her life, the next inquiry is, whether the plaintiff, by recovering a judgment against him and purchasing the premises on the execution, is in a better situation than he would have been were she, or her representatives, now asserting a claim against him to subject the premises to the payment of a compensation for the provision which he had failed to make. Upon this point, the cases already referred to for another purpose, and many others, are entirely decisive. It will be sufficient to mention the case *In the Matter of Howe*, and that of *Arnold v. Patrick*, which are full to this purpose. In the last case, the equitable lien for the balance of the purchase money was established against a judgment creditor who had sold the land on execution, and had himself become the purchaser. The chancellor said the plaintiff in the judgment was not entitled to claim protection as a *bona fide* purchaser, even if he had no notice of the facts establishing the equitable lien; "for," he added, "he bid in the property on his own judgment for an antecedent debt, paying no new consideration. He, therefore, took the legal title under the sheriff's sale, subject to the equitable lien for the unpaid purchase money."

Considering the rights of the parties to be such as have been

mentioned, and the fact being that the defendant is in possession under Sarah Howland, the remaining question is, whether the plaintiff can maintain ejectment on his legal title against a party clothed with her equitable interest. It is well settled, that a mortgagee in possession, the mortgage being forfeited by non-payment, can defend himself in a possessory action brought by the mortgagor, though, if he were out of possession, he could not now maintain ejectment against the latter (*Phyfe v. Riley*, 15 Wend. 248). But this, I think, is not so, except in the case of a technical mortgage, conveying, subject to the condition, a legal title to the premises (*Marks v. Pell*, *Jackson v. Parkhurst*, *supra*). If the present were, therefore, an action of ejectment, prosecuted under the former practice, in which nothing but legal principles could be taken into consideration, then, as the deed from Aylesworth to Mrs. Howland has been found to be fraudulent, I think the defendant could not resist the plaintiff's title. But, since the blending of legal and equitable remedies, a different rule must be applied. The defendant can defeat the action upon equitable principles; and if, upon the application of these principles, the plaintiff ought not to be put into possession of the premises, he cannot recover in the action. It has been shown that the premises were, in effect, mortgaged to Howland and his wife to secure the performance of Aylesworth's agreement to support them and the survivor of them during life, and that the plaintiff has taken the place of Aylesworth. When he obtained title by the execution of the sheriff's deed, Aylesworth had been in default in the performance of his agreement for nearly three years. Mrs. Howland and her grantees, it is true, had been in possession, and had enjoyed the use of the premises, but no account has been taken to show how far the income derived from that source would go in fulfilment of the agreement. This action is not brought for a redemption, and is not adapted to that kind of relief. It would be manifestly inequitable to let the plaintiff into possession until he shall procure an account to be taken, and shall pay or tender the amount which shall be found in arrear upon the above mentioned agreement, executed by Aylesworth, for the support of Mrs. Howland up to the time of her death.

The judgment of the Supreme Court must be reversed; and, as we cannot certainly say what case the plaintiff may make, now that the legal principles which govern the action have been determined, there must be a new trial, with costs to abide the event. If the main features of the case cannot be changed, the only remedy

for the plaintiff is to institute a suit for redemption, upon the principles which have been mentioned.

All the judges concurring,

Judgment reversed, and new trial ordered.¹

BURDICK v. JACKSON

SUPREME COURT OF NEW YORK, GENERAL TERM, 1876

(7 Hun, 488)

APPEAL from a judgment entered on the report of a referee dismissing the complaint.

The action was brought by the plaintiff as assignee in bankruptcy, to set aside a mortgage given by the bankrupt to his nieces, the defendants, Ida J. Jackson and Carrie A. Jackson, on the ground that it was a fraudulent preference under the bankrupt act. The mortgage was executed eighteen days before the filing of the petition in bankruptcy, but was given in pursuance of a parol agreement between the bankrupt and the guardian of the infants more than fifteen months before.

This appeal was argued at the January term, 1875, and a re-argument ordered at the October term following.

GILBERT, J. We concur fully with the referee in his conclusions of fact and of law. One of the first principles of equity is that it looks upon things agreed to be done, as actually performed. Acting upon this principle, courts of equity in England and in this country have held that an agreement based upon a valuable consideration to give a mortgage, will be treated in equity as a mortgage. That doctrine has been acted upon so frequently and for so long a period of time that it may justly be regarded as forming a part of the law of the land (Story Eq. Jur., § 553; *Russel v. Russel*, 1 Bro. C. C. 269, and notes to that case in 1 Lead. Cases Eq. 541; *Read v. Simons*, 2 Desauss. 552; *Welsh v. Usher*, 2 Hill Eq. 167; *Dow v. Ker*, 1 Spen. Eq. 414; *Bank v. Carpenter*, 7 Ohio, 21; *In re Howe*, 1 Paige, 125; *Chase v. Peck*, 21 N. Y. 581; Willard Eq., Potter's ed. 441, *et seq.*). If, therefore, the agreement of December, 1871, had been made directly with the defendants, Ida and Carrie, there can be no question that it would have given them a

¹ See *Hall v. Hall*, 50 Conn. 104 (1882).

specific equitable lien upon the land in controversy, which would have been prior and paramount to the title of the plaintiff and to the general liens of the judgment creditors whom he represents. Having been made with their guardian while they were infants, it inured to their benefit and was well executed by the mortgage to them. Conceding that while the agreement remained executory it was within the statute of frauds, and so not enforceable for the reason that it was not in writing, yet, when the promisor actually executed the agreement by the delivery of a formal mortgage, all objection to its validity, on that ground, was removed, and the agreement became as effectual for all purposes as if it had been reduced to writing originally (*Simeon v. Schurk*, 29 N. Y. 598; *Dodge v. Wellman*, 1 Abb., Ct. App. Dec. 512; *In re Howe*, *supra*; *White v. Carpenter*, 2 Paige, 217; *Arnold v. Patrick*, 6 *id.* 310). Under our statute a parol agreement in respect to lands cannot be avoided in equity because it is not in writing, where there has been a part performance of it (*Freeman v. Freeman*, 43 N. Y. 34). *A fortiori*, it cannot where it has been fully executed. The plaintiff is not a *bona fide* purchaser, but stands in the shoes of the bankrupt. He cannot, therefore, assert any better right than the bankrupt himself. The execution of the mortgage gave the defendants a lien, which took effect, by relation, as against the bankrupt and purchasers from him with notice, at the time the agreement to give it was made. The plaintiff, not being a *bona fide* purchaser, took the transfer to him subject to that lien. That being so, no question of fraud or of a preference in violation of the provisions of the bankrupt act has arisen, and the evidence precludes any inference of other kinds of fraud. It is unnecessary to review the cases cited on behalf of the appellants, for none of them seem to us to conflict with the foregoing views.

The plaintiff is not in a position to raise the objection that the agreement to discharge the old mortgage and to receive the new one in lieu of it was invalid because the guardian violated his duty and transcended his power in making such an agreement. Such a transaction is not absolutely void, but is voidable only, at the election of the infants on coming of age. It being obviously for the benefit of the infants that the lien shall be established and upheld, we will give effect to the intendment that their ratification will be forthcoming at the proper time and to the rule that no one but themselves can disavow the authority of their guardian to make the agreement (Co. Lit., 2b; 2 Kent Com. 236; *Keane v. Boycott*, 2 H. Bl. 511; *U. S. v. Bainbridge*, 1 Mason, 82). The plaintiff

has no claim to be the champion or protector of the infants and can acquire no rights by assuming that character.

Some objections to the admission of evidence were taken by the plaintiff. We think they were properly overruled.

The judgment should be affirmed, with costs, to be paid out of the estate of the bankrupt, if that is sufficient; otherwise by the plaintiff personally.

SMITH, J., concurred.

MULLIN, P. J., concurred solely on the ground that it was shown on the trial that the defendants were not at the time of receiving the mortgage aware of the insolvency of the mortgagor, and that the mortgage, as to them, was in fraud of the bankrupt law.¹

Judgment affirmed, with costs.

AHREND v. ODIORNE, 118 Mass. 261 (1875). GRAY, C. J. The plaintiff principally relies upon the doctrine of the English courts of chancery that the vendor of real estate by an absolute deed has a lien thereon for the unpaid purchase money, without proof of any agreement of the parties to that effect.

The earliest case which contains a full discussion of the doctrine, the source from which it is derived, and the reasons and authorities by which it is supported, is *Mackreth v. Symmons*, 15 Ves. 329, decided by Lord Eldon in 1808. If, as the learned chancellor thought, "the doctrine is probably derived from the civil law as to goods," it is somewhat remarkable that it was never applied in England except to real estate (Adams on Eq. 127). The only grounds upon which it has been rested are natural equity; a supposed intention of the parties; and a trust arising out of the unconscientiousness of the vendee's holding the land without paying the price.

¹ But cf. *Mathews v. Hardt*, 79 App. Div. 570 (1903), where O'BRIEN, J., said at p. 581: "The trend of the decisions . . . is in support of the view that, with respect to an instrument of transfer, it is the time when such instrument is recorded, or when possession is taken, or notice is otherwise brought home to the creditors of the bankrupt, that is controlling." Distinguishing the principal case (p. 579).

In *Nat. Park Bank v. Whitmore*, 104 N. Y. 297 (1887), EARL, J., said (*dictum*) at p. 303: "Security, honestly given in pursuance of a promise, relates back to the date of the promise, and, except as to intervening rights, is just as good and effectual as if given at the date of the promise; and it has been generally so held even in bankruptcy proceedings," citing the principal case.

It was forcibly argued by counsel in *Blackburne v. Gregson*, 1 Cox Ch. 90, 100; s. c. 1 Bro. Ch. 420, and not answered by the court, "As to the general question of the lien, it is called a natural lien; but it certainly is not so with respect to personalty, which, if once delivered, it is conclusive, though concealed from all mankind; and there seems as much natural equity in the case of personalty as realty."

The presumption of an intention of the parties has been well disposed of by Chief Justice Gibson: "The implication that there is an intention to reserve a lien for the purchase money, in all cases in which the parties do not by express acts evince a contrary intention, is in almost every case inconsistent with the truth of the fact, and in all instances, without exception, in contradiction of the express terms of the contract, which purport to be a conveyance of everything that can pass" (*Kauffelt v. Bower*, 7 S. & R. 64, 76, 77).

The theory that a trust arises out of the unconscientiousness of the purchaser would construe the non-performance of every promise, made in consideration of a conveyance of property to the promisor, into a breach of trust; and would attach the trust, not merely to the purchase money which he agreed to pay, but to the land which he never agreed to hold for the benefit of the supposed *cestui que trust*.

The most plausible foundation of the English doctrine would seem to be that justice required that the vendor should be enabled, by some form of judicial process, to charge the land in the hands of the vendee as security for the unpaid purchase money. And the restriction of the doctrine to real estate suggests the inference that the Court of Chancery was induced to interpose by the consideration that by the law of England real estate could neither be attached on mesne process, nor, except in certain cases or to a limited extent, taken in execution for debt (2 Bl. Com. 160, 161; 4 Kent, Com., 12th ed., 428, 429).

But by an act of Parliament, passed in 1732, lands and other real estate within the English colonies were made chargeable with debts and subject to like process of execution as personal property (St. 5 Geo. II., c. 7, § 4). And in Massachusetts lands had been made subject to attachment, as well as execution, by successive statutes of the Colony and Province, reaching back almost to the time of the first settlement (Col. Sts. 1644, 1647; 2 Mass. Col. Rec. 80, 204; Mass. Col. Laws, ed. 1672, 7, 104; Prov. St. 1696, 8 W. III., c. 10; 1 Mass. Prov. Laws, State ed., 254; Anc. Chart. 49, 154, 155,

292; 5 Dane Ab. 23). There is much less reason therefore for adopting the doctrine in this Commonwealth than in England (*Womble v. Battle*, 3 Ired. Eq. 182; *Wragg v. Comptroller General*, 2 Desaus. 509).

In *Gilman v. Brown*, 1 Mason, 191, 219, Mr. Justice Story said: "Nothing can be clearer than that by the law of Massachusetts no lien in any case whatever exists upon land for the purchase money." In the argument of the same case on appeal, this was admitted on both sides (*Brown v. Gilman*, 4 Wheat. 255, 264, 273) and the Supreme Court, in the opinion delivered by Chief Justice Marshall, expressed no doubt upon that point. Mr. Dane also says that no such lien exists in Massachusetts (9 Dane Ab. 159).

It is true that in their time this court had a very limited jurisdiction in chancery. But ever since 1836 it has been vested with full equity jurisdiction over all trusts, express or implied (Rev. Sts., c. 81, § 8, & commissioners' notes; *Wright v. Dame*, 22 Pick. 55; Gen. Sts., c. 113, § 2). During this period of almost forty years, only two attempts have been made to invoke the exercise of this jurisdiction in cases at all analogous to the present. In *Wright v. Dame*, 5 Met. 485, 503, the general question of vendor's lien was argued; but as the facts of the case showed an express trust, it was not decided. But the opinion of the court in *Hunt v. Moore*, 6 Cush. 1, 3, strongly tends to the conclusion that the failure of a purchaser of land to pay the consideration agreed could not create an implied or resulting trust. The suggestion, at the close of that opinion, that a court of full equity powers might perhaps afford the plaintiff relief, did not relate to the trust relied on, but to an allegation of fraud, of which, as a distinct head of equity jurisdiction, this court had no cognizance until the passage of the St. of 1855, c. 194.

The English doctrine of vendor's lien has been adjudged not to exist in Maine (*Philbrook v. Delano*, 29 Maine, 410, 415). And it does not appear to have been ever adopted in any of the New England States, except Vermont, in which, after being affirmed by the court, it has been abolished by the Legislature (*Arlin v. Brown*, 44 N. H. 102; *Perry v. Grant*, 10 R. I. 334; *Dean v. Dean*, 6 Conn. 285; *Atwood v. Vincent*, 17 Conn. 575; *Manly v. Slason*, 21 Vt. 271; St. of Vt. of 1851, c. 47; Gen. Sts. of Vt. of 1862, c. 65, § 33).

In *Brown v. Gilman*, 4 Wheat. 255, 290, Chief Justice Marshall treated the question as governed by the consideration whether the doctrine had been adopted by the law of the particular State. And the doctrine has never been affirmed by the Supreme Court of the

United States, except where established by the local law, as, for instance, in Ohio (*Bayley v. Greenleaf*, 7 Wheat. 46; *Tiernan v. Beam*, 2 Ohio, 383), in Georgia (*M'Lean v. M'Lellan*, 10 Pet. 625, 640; *Harden v. Miller*, Dudley, 120), and in the District of Columbia (*Chilton v. Brand*, 2 Black, 458); the doctrine having been previously affirmed in the States of Maryland and Virginia, out of which the district had been formed (*Moreton v. Harrison*, 1 Bland, 491; *Redford v. Gibson*, 12 Leigh, 332); although it has since been abolished in Virginia by statute (*Yancey v. Mauck*, 15 Grat. 300).

The decisions in the courts of those and many other States in favor of the doctrine, which are collected in the notes to 2 Sugden on Vendors, 8th Am. ed., c. 19, suggest no reasons and afford no grounds why we should now for the first time adopt in this Commonwealth a doctrine which has never been supposed by the profession to be in force here; which would introduce a new exception to the statute of frauds; which, as experience elsewhere has shown, tends to promote uncertainty and litigation; and which appears to us to be unfounded in principle, unsuitable to our condition and usages, and unnecessary to secure the just rights of the parties. If no third person has acquired any rights in the land by *bona fide* attachment or conveyance, the original vendor may secure payment of the debt due him for the purchase money by the usual attachment on mesne process. If any third person has acquired rights in the property, there is no reason why equity, any more than the common law, should interpose to defeat them.

It may be doubted whether, upon the case stated in the bill, the plaintiff would be held entitled to the lien which he asserts in those courts which recognize the existence of a vendor's lien for unpaid purchase money (1 Perry on Trusts, § 235). But as we are clearly of opinion that no such lien exists in this Commonwealth in any case without agreement in writing, we do not propose to entangle ourselves in the refinements and embarrassments which are inseparable from its judicial consideration and affirmance.

ELTERMAN v. HYMAN

COURT OF APPEALS OF NEW YORK, 1908

(192 N. Y. 113)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 14, 1907, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

This action was brought to recover the amount paid upon a contract for the purchase of land as well as the amount incurred for expenses in examining the title and to establish and enforce a lien therefor upon the ground that the plaintiff was ready and willing to perform while the defendant was not because the title was unmarketable. The answer admitted the contract and the payment made thereon, but denied the remaining allegations of the complaint. It alleged facts constituting a counterclaim and asked that the plaintiff be adjudged to specifically perform by paying the balance of the purchase price.¹

VANN, J. The question remains whether a vendee, not in possession and with no special equity, has a lien for the amount paid on a contract for the purchase of land that can be foreclosed upon the default of the vendor? The Appellate Division in the first department, after thorough discussion, two elaborate opinions having been written, one on either side, has held that a lien exists for the amount paid on the contract, but not for the expense of examining the title. (*Occidental Realty Co. v. Palmer*, 117 App. Div. 505.) The rule in the second department is that no lien exists even for the purchase money paid down, unless the vendee has taken possession. (*Klim v. Sachs*, 102 App. Div. 44.) The subject was not considered at length in the case last cited, only three sentences being devoted to it; and while the judgment was modified by striking out the part giving a lien, it was affirmed as to the recovery of the sum paid on the contract, although the action was in equity. This case was followed without discussion by the same court in *Krainin v. Coffey* (119 App. Div. 516).

The right of a vendor to a lien for the purchase money unpaid is well established, and the courts of this state have uniformly recog-

¹Statement of facts abridged. Only portion of the opinion of VANN, J., is printed.

nized the right of a vendee to a lien when he was in possession, or had made improvements, or where special equities intervened. (*Parks v. Jackson*, 11 Wend. 442; *Chase v. Peck*, 21 N. Y. 581; *Gibert v. Peteler*, 38 N. Y. 165; *Tompkins v. Seeley*, 29 Barb. 212, 217.) In some cases in this state and generally in other states which give a lien to the vendor, a lien has been decreed although there was no equity except that arising from payment on the land, pursuant to a contract for the land, provided the vendor made default. (*Occidental Realty v. Palmer*, *supra*; *Stevenson v. Spratt*, 3 J. & S. 496, 503; *Clark v. Jacobs*, 56 How. Pr. 519; *Craft v. Latourette*, 62 N. J. Eq. 206; *Bullitt v. Eastern Ky. Land Co.*, 99 Ky. 324, 327; *Shirley v. Shirley*, 7 Blackf. [Ind.] 452; *Coleman v. Floyd*, 131 Ind. 330, 335; *Galbraith v. Reeves*, 82 Tex. 357; *Newman v. Maclin*, 3 Hayw. [Tenn.] 241; *Sautelle v. Carlisle*, 13 Lea [Tenn.], 391, 397; *Wickman v. Robinson*, 14 Wis. 493, 496.)

The question does not appear to have been before the Supreme Court of the United States, although it has declared that "the vendor is a trustee of the legal title for the vendee to the extent of his payments." (*Jennisons v. Leonard*, 21 Wall. 302, 309.)

We find no well-considered case in any state that denies a lien to the vendee, even if payment is the only ground therefor, except such as withhold a lien from the vendor also. (*Ahrend v. Odiorne*, 118 Mass. 261; *Philbrook v. Delano*, 29 Me. 410.) The doctrine is well established in England where it is sometimes said to have originated as recently as 1855, but it was clearly announced nearly twenty years before the Revolutionary war by a court of which LORD MANSFIELD was a member. (*Burgess v. Wheate*, 1 W. Blacks, 123, 150.) It was recognized by Lord St. Leonards in the first edition of his great work on Vendors and Purchasers, published in 1805 (p. 671), and three years later by LORD ELDON in *Macreth v. Symmons* (15 Vesey, Jr., 329, 344). In 1855, however, the question arose directly and although the vendee was not in possession and there was no special equity in his favor he was held to have a lien both upon principle and authority. (*Wythes v. Lee*, 3 Drewry's Ch. 396, 403.)

In 1864 the question was fully discussed in the House of Lords and it was adjudged without dissent that the vendee has a lien, because every payment by him in *pro tanto* performance of the contract on his part and in equity transfers to him a corresponding portion of the estate. (*Rose v. Watson*, 10 H. L. Cas. 672.)

Quite recently a case arose in the Chancery Division of the Court of Appeal where a contract for the purchase of land authorized the

purchaser to rescind on the happening of a specified event and in due exercise of the power he rescinded the contract, but it was held that he had a lien on the land for the deposit which he had made. (*Whitbread & Co. Limited, v. Watt*, L. R. [1 Ch. Div. 1902] 835.)

In the case last cited the lien is spoken of as the invention of equity for the purpose of doing justice, but this is the foundation of all equitable liens. They did not exist at common law, but were created by courts of equity because required by natural equity. They do not depend upon express contract, but on the principle that one person has the legal title to something that another person has a natural and, hence, within well-guarded limits, a better right to, or to some part thereof.

Whether the foundation of the lien is natural equity, imputed intention, partial ownership, the implication of a trust, or a blending of some of these sources, the authorities, almost without exception in those jurisdictions which give a lien to the vendor, are clear that one exists. As the vendor has a lien because he owned the land but conveyed prematurely and the vendee ought not to keep it without paying for it, so, as it seems to me, the vendee has a lien because he has paid for the land pursuant to contract, and as he cannot get the land, he has a right to get out what he put in on the faith of the land. The lien springs from the trust under which the vendor, as the legal owner, holds the land for the vendee, the equitable owner. Part payment creates partial ownership, and the vendee has an interest in the land itself to the extent of the payments made thereon. The contract and payment in full make him the equitable owner of all the land. The contract and payment in part make him the equitable owner *pro tanto*. When the vendor cannot convey, the equitable owner, wholly or in part, may assert his rights in a court of equity to get out of the land what he paid on it. If the vendor is not the absolute owner, the lien of the vendee "exists only to the extent of the vendor's interest," which in this case is only that of a sub-purchaser. (*Aberaman Iron Works v. Wickens*, L. R. [4 Ch. App.] 101; Fry on Specific Performance [3d Am. ed.], 660.) The right is correlative to that of the vendor conveying without payment. In either case the *res*, or the subject of the contract, is the land, and whatever is paid on the land without corresponding conveyance, or conveyed without corresponding payment, is a lien on the land by virtue of parting with money on the faith of the land, or with land on the faith of the promise to pay for it. Payment is not made on the

credit of the vendor, but on the credit of the land, and the purchaser's money, in equity, is converted into land, or attached to it as a lien. The equitable ownership, when specific performance cannot be had, is converted into money by a judicial sale of the vendor's interest, which in effect is the foreclosure of an equitable mortgage.))

It is insisted that the whole agreement is to be taken together and completely performed or wholly rescinded, and that rescission by the vendee destroys the contract *in toto* and *ab initio*. The same argument was urged by counsel in *Rose v. Watson*, and the complete answer of LORD WESTBURY has already been quoted. None of the authorities relating to the lien of a vendee, and we have cited but few out of many, seem to regard the doctrine of rescission as at all applicable to the subject. This is not an action at law resting on rescission by which an election is made to declare the contract void in its inception, but a suit in equity resting on the equitable principle that the vendee by the contract and payment acquired an interest in the land. Rescission was neither alleged nor found and as the affirmance was unanimous we cannot look into the evidence for further facts. The vendee does not elect to nullify the contract nor seek remission to his original rights when he asserts his acquired rights, depending wholly on the contract and his action thereunder. He recognizes the contract as a subsisting obligation, valid in its inception and still in force, and founds his entire claim for relief on the theory that because it is valid and he has made payments on it as required by it, he has become an owner of the land in equity to the extent of such payments. He accepts "the situation which the wrongdoing of the other party has brought about," and tries to get out of the land what he paid on it under the contract. The termination of a contract as to the future by one party owing to the default of the other is a rescission neither *ab initio*, nor in any true sense. (*Hurst v. Trow P. & B. Co.*, 2 Misc. Rep. 361, 366; 142 N. Y. 637.) If it were, it would involve the surrender of possession taken pursuant to a provision authorizing it and the abandonment of all improvements made while in possession. The vendee does not rescind when without fault he goes into a court of equity and insists on a right springing from the contract and payment thereon pursuant to its terms. He does not repudiate the contract, but stands on it and affirms it as the foundation of the right he seeks to enforce, as fully as if he sought entire specific performance. He does not abandon his equitable ownership by trying to assert it in the only way that it can be asserted. The con-))

tract has been performed by him, wholly it may be, or in part, as in the case before us, and as, owing to the fault of the vendor, he cannot have the full performance to which he is entitled, he asks for partial performance by the enforcement of the trust created by the contract and payment as provided thereby. He does not sue for money had and received, but to enforce a lien on land into which the money went. Nor does he rescind the contract, which is the source of his lien, by seeking to enforce it to the only extent now possible, owing to the breach by the vendor, but he demands that equity should give him the interest in the land that he acquired by the contract and payment. The denial of that right would be an encouragement to wrongdoing, and to hold that an attempt to foreclose the equitable lien is a rescission of the contract would deny the right in all cases, including those in which the vendee is in possession and has made improvements.

The analogy of personal property is suggested and it is argued that the purchaser may pay on potatoes the same as on land, but the rules applicable to real estate, which, as part of the solid earth, is immovable and indestructible, have never been applied and in the nature of things cannot be applied to movable property that can disappear in a moment, can be delivered from hand to hand and which usually is paid for on delivery. The analogy, if logically and universally applied, would destroy many of the rules of equity, established after centuries of earnest thought by the most learned lawyers known to jurisprudence.

The judgment appealed from should be reversed and a new trial granted, with costs to abide the event.

CULLEN, Ch. J., and HAIGHT, J., concur; GRAY, HISCOCK and CHASE, JJ., concur in result for reasons stated in opinion of GRAY, J., in *Davis v. Rosenzweig Realty Operating Co.*,¹ decided herewith; WILLARD BARTLETT, J., dissents solely on the ground that no action is maintainable to enforce a vendee's lien.

*Judgment reversed, etc.*²

¹ 192 N. Y. 128 (1908).

sale, see *Lenox v. Earls*, 185 S. W.

² As to the availability of vendor's lien to beneficiary of contract of

(Mo.) 232, and note, 30 Harv. Law Rev. 92 (1916).

VANIMAN v. GARDNER

A 53

APPELLATE COURT OF ILLINOIS, THIRD DISTRICT, 1901

(99 Ill. App. 345)

STATEMENT.—On April 11, 1895, Anthony Roberts and his wife entered into the following written agreement with their son, Moss Roberts:

"Agreement between Anthony Roberts and Sarah J., his wife, of the first part, and Moss Roberts, their son, second part. Witnesseth, that said Anthony Roberts is the owner of the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ section 24, township No. 12, range No. 6, west of the 3rd P. M., in Macoupin county, Illinois, on which all of said parties reside and occupy as a homestead; and, whereas, it is desirable that a new house shall be erected on said tract of land for the comfort and use of all said parties so long as they shall live upon said tract of land. It is therefore agreed by the said parties that said Moss Roberts shall erect on said premises a house which shall be convenient and suitable for the use of said parties, including the family of Moss Roberts. That Moss Roberts shall have the right to pull down the old house now on said premises and use the material thereon fit to be used in building the new house, and said new house shall be built and completed within the next ninety days after the date of this agreement.

And in consideration of the said building, the said parties of the first part agree that in case they shall sell the said tract of land, then there shall be due and payable to said Moss Roberts out of the money arising from such sale the sum of \$500, together with interest thereon, from the time of the completion of said house until paid, at the rate of six per cent per annum, and in case of the death of the said Anthony Roberts leaving no will by virtue of which said Moss Roberts shall become devisee and owner of said tract of land, then and in that case, there shall be paid to said Moss Roberts, out of the estate of said Anthony Roberts, the said sum of \$500, together with six per cent interest thereon from the completion of said house until paid.

(Signed) Anthony Roberts, (Seal.)
Sarah J. Roberts, (Seal.)
Moss Roberts." (Seal.)

The instrument was filed for record and recorded in the recorder's office of Macoupin county, July 12, 1895.

The house was built by Moss Roberts with money obtained from a bank at Virden, Illinois, on notes executed by him and George Vaniman as security. The written agreement was delivered to Vaniman and afterward indorsed as follows:

"I assign the benefit of the within contract to George Vaniman as security to him for signing notes.

(Signed) Moss Roberts."

In 1898 Anthony Roberts and wife conveyed the land to Martha J. Roberts, who, on August 18, 1900, executed note and mortgage on the land to Alva L. Gardner, to secure an indebtedness of \$500, due ten days after date. Gardner filed a bill to foreclose. Appellants, the administrators of George Vaniman, who were made defendants, together with others, answered and filed a cross-bill, in which they set up that there was a lien in favor of the deceased, by virtue of the above quoted agreement, and its assignment, and a payment by them, as administrators of Geo. Vaniman, of the notes on which he was surety for Moss Roberts. The court sustained a demurrer to the cross-bill, holding that appellants had no lien on the land, and rendered a foreclosure decree in favor of Gardner.

MR. PRESIDING JUSTICE HARKER delivered the opinion of the court.

It is contended by appellant, first, that under the written agreement of April 11, 1895, an equitable lien or mortgage was given Moss Roberts upon the land in question, whereby equity will enforce the payment of the \$500 specified in the agreement, as a first lien upon the land; second, that appellants are subrogated to all rights of Moss Roberts under the agreement by virtue of his assignment thereof to George Vaniman.

While, as a general rule, any written contract entered into for the purpose of pledging property or some interest therein as security for a debt, which is informal or insufficient as a common law or statutory mortgage, but which shows that it was the intention of the parties that it should operate as a charge upon the property, will constitute an equitable mortgage and may be enforced as such in a court of equity, yet a mere promise to pay out of the proceeds of the sale of the property is not sufficient to create an equitable mortgage upon the property itself.

"The intention must be to create a lien upon the property, as distinguished from an agreement to apply the proceeds of a sale of it to the payment of a debt." Jones on Liens, Sec. 32;

Gibson v. Decius, 82 Ill. 304; *Hamilton v. Downer*, 46 Ill. App. 541.

We are unable to see in the written contract involved in this case an intention on the part of Anthony Roberts to create a lien or charge upon the land. It did not obligate him to sell the land and clearly contemplated that he might or might not sell it, as he saw fit. It only provided two events in which there should be due his son the \$500; one in case he should sell the land and the other in case he should die leaving no will under which his son should become owner of the land. In the former case the son was to be paid out of the proceeds of sale, and in the latter he should be paid out of the estate of Anthony Roberts. As we view it, the import of the contract was more to fix events for the maturity of an obligation than to pledge the land for its payment.

It is evident that there was no intention that Moss Roberts should have a lien on the land for the money in the event of his father dying intestate, because the language of the contract is, that in that event, he should be paid out of his father's estate. Again, the provision that in the event of sale by Anthony Roberts, the money should be paid Moss Roberts out of the proceeds of the sale, fully recognizes the right of the former to sell, and that right carried with it the power to invest his purchaser with the title free from any lien arising out of the contract. If the contract created no equitable lien in favor of Moss Roberts, none, of course, can be held to exist in favor of his assignee.

The evidence shows that the \$500 note to Gardner represented a *bona fide* debt, and there is nothing in the record to warrant a suspicion, even, that the giving of the mortgage to him had any other than an honest purpose to secure the debt.

*Decree affirmed.*¹

PERRY v. BOARD OF MISSIONS

COURT OF APPEALS OF NEW YORK, 1886

(102 N. Y. 99)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made February 4, 1884, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

This action was brought to have a lien declared in the nature

¹ *Accord, Britt v. Harrell*, 105 N. C. 10 (1890).

of a mortgage upon certain premises, the title to which is in the defendant, for moneys advanced by plaintiff to pay for repairs and improvements upon said premises.

DANFORTH, J. Upon trial before a referee the plaintiff has been declared entitled to a lien in the nature of a mortgage upon certain premises on Elk Street, in the city of Albany, for a balance due him for advances made for improvements and repairs thereon and for interest on an existing mortgage, amounting to the sum of \$4677.38, besides costs, and in case the same is not paid within a certain time, that said real estate be sold in the same manner as sales are made upon mortgage foreclosure, and, of the proceeds of such sale, the plaintiff be paid the amount of said lien, with interest as aforesaid, together with his costs and disbursements. Upon appeal to the General Term the judgment upon this report was affirmed.

Some objections were made by the defendant to the admission of certain testimony, but it is not now contended that the facts found by the referee are not warranted by the evidence, or that they were not within the issues raised by the pleadings. The contention is against the referee's conclusion of law. It appears by his report that in September, 1869, the Right Reverend William Croswell Doane was bishop of Albany, and at that time by the action of the convention of the Protestant Episcopal Church in that diocese a committee was appointed to take such steps as they might deem expedient for procuring a residence for the bishop; that in February, 1870, the vestry of St. Peter's church, in that city, appointed a committee, of which the plaintiff was chairman, to solicit subscriptions for the above purpose, and in that character he received moneys from various persons, in all to the amount of \$12,-825, and in June, 1870, under the advice of the bishop, and with the consent of the diocesan committee, he bought the premises above referred to at the price of \$18,000 (of which \$5000 was in a then existing mortgage). He paid the residue, and upon like consent caused the property to be conveyed, subject to the mortgage, to a corporation called "The Trustees of the Episcopal Fund of the Diocese of Albany;" that thereupon "plaintiff, at the request of the bishop, commenced making various improvements, alterations and repairs in the dwelling upon the premises so purchased, all of which were necessary and proper to make it a suitable and convenient residence for him, and the plaintiff advanced the moneys required to pay the bills for such improvements and repairs; that

at the annual meeting of the diocesan convention, in September, 1870, the diocesan committee made a report which stated the manner in which the title was taken, described the property and referred to the repairs and improvements. This report was, on motion, accepted." And at the same time the convention, with the consent of the trustees of the Episcopal fund, directed them to transfer the title to said property to the defendant herein, "to be held and used for the support of the Episcopate, and be a place of residence for the bishop of the diocese, and that the said board of missions be authorized and directed to make a bond and mortgage on the premises to secure the payment of the incumbrance thereon, of \$5000, and also the payment of the sum advanced for the repairs and fitting up of the same for the Episcopal residence," intending thereby to provide for and cover all the expenditures incurred by plaintiff for the improvements and repairs then in progress, and contemplated and included, as well the sums thereafter advanced as those which had then been actually paid.

The defendant is a corporation having power, among other things, to take and hold property used or intended to be used for "diocesan institutions or purposes in the said diocese," and is subject to the directions and instructions which shall be given to it by the said convention (Laws of 1870, c. 13).

At this time the repairs and improvements were in progress, and only the sum of \$173.92 had then been advanced by plaintiff in payment therefor. On the 20th of October, 1870, in accordance with the above directions, the trustees of the Episcopal fund of the diocese of Albany conveyed the premises to defendant in trust as a residence for the bishop of Albany, and on the same day, at a regular meeting of the board, the following resolution was passed:

"Resolved, That this board do, in accordance with the direction of the convention, hereby accept the conveyance of the said premises, to be held in trust for the uses and purposes above mentioned, and further that the president of this board, the Rt. Rev. William Croswell Doane, S. T. D., Bishop of Albany, be and is hereby authorized in its name and behalf to execute and affix the corporate seal of this board to a bond and mortgage upon the said premises for a loan not to exceed \$8500, with interest, the proceeds of which shall be applied to the payment of the said existing mortgage of \$5000 thereon, and the said expenses of the said repairs and improvements," and in pursuance of said resolution on December 30, 1870, defendant, by its president aforesaid, executed and delivered to one Earl L. Stimson a bond with a mortgage upon the

premises aforesaid for the sum of \$8500, which sum was loaned and advanced to it by said Stimson, and was by it paid over to plaintiff, who paid out of the same the mortgage of \$5000, and the interest thereon, then unpaid, amounting in all to the sum of \$5220.47, and the same was cancelled of record, and the balance of said sum was credited and applied by plaintiff in his account for the advances made by him as aforesaid toward the purchase price of said premises, the expenses incident to the same, and for said improvements and repairs.

Other facts are found which require no special mention, but which show that the amount for which a lien was declared was justly due for advances made under the circumstances above stated.

It is objected by the appellant that the plaintiff is not, by reason of any of these facts, entitled to an equitable lien upon the premises for the benefit of which they were made. We are of a different opinion.

The principle upon which a court holds that a vendor who has not been paid is entitled to a lien on the land sold is that it would be contrary to natural justice to allow a purchaser to retain an estate which he has not paid for, and it seems very clear that there is a like natural equity in favor of the plaintiff. It is true he did not sell the estate, but he added to it, and by his expenditures upon it fitted it for the purpose for which it was intended. A lien for the price of an estate sold exists without any special agreement and by virtue of a doctrine merely of a court of equity. Here there is a special agreement and also a case to which the doctrine applies:

First. The special agreement. It may be found in the resolution of the convention of 1870, by which the defendant was required in substance to provide by bond and mortgage "for the payment of the sum advanced for the repairs and fitting up of the Episcopal residence"—the one in question. The learned counsel for the appellant seeks to limit this expression by the rules of grammar, and confine the security to the sum then or already advanced, to the exclusion of all advances subsequent thereto. We do not think, however, that the framers of the resolution selected the word for the purpose of marking either present or future time, but to denote a fact which might include various transactions requiring the expenditure of money by some person other than themselves, the whole, by whomsoever or whenever made, constituting "the sum advanced," in rendering the place fit and suitable as a residence for the bishop of the diocese. The resolution in question

was in writing; it was entered in the journal of the convention, and the defendant was bound to conform to it (C. 13, Laws of 1870, *supra*). ✓

Second. The plaintiff's case is within the general doctrine of equity, which gives a right equivalent to a lien, when in no other way the rights of parties can be secured.¹ The advances were directly for the benefit of the real estate; they were approved by the convention by whose directions the title was conveyed to the defendant, but neither the convention nor the defendant have incurred any corporate liability, and while it may be said that the advances were made on the promise of, or in the just and natural expectation that, a mortgage would be given, it is also true that they were made on the credit of the property, for the improvement of which they were expended. The repairs and improvements were permanently beneficial to it, made in good faith, with the knowledge and approbation of the parties interested, and accepted by them, not as a gratuity, but as services for which compensation should be given. The plaintiff's right to remuneration is clear, and unless the remedy sought for in this action is given, there will be a total failure of justice. }

It would seem to follow that no error was committed by the referee in directing a sale of the property, and the application of the proceeds to the payment of the plaintiff's claim. But the learned counsel for the appellant argues that as the defendant's relation to the property is that of trustee, such enforcement of the lien would destroy the trust, and so defeat the very object of the conveyance through which they derive title. The trust was for the habitation and use of the bishop of the diocese; it was accepted with notice that the improvements were necessary to fit the buildings for occupation, and had been begun under proper authority. It was the duty of the defendant to allow them to be finished, and it will be no violation of the conditions upon which the premises are held, to subject them to a charge for the cost of the repairs through which alone the purposes of the trust were accomplished. If the building should now be burned, it might with the same force be urged that the mechanic who might repair or reconstruct it could acquire no lien, because enforcing it might diminish or even absorb the property. A statutory lien would be no better than the plaintiff's lien in equity. }

The usual course of enforcing an equitable lien is by a sale of }

¹ See, also, *Sullivan v. Corn Exchange Bank*, 154 App. Div. 296, 139 N. Y. S. 97, 101 (1912).

the property to which it is attached, and we find nothing in this case to take it out of the general rule. The appellant's remaining point is a sweeping one relating to various items of evidence of the bishop's declarations, letters and acts in connection with the purchase and repairs of the house. Under the circumstances disclosed in the record, they were properly received, either as acts of agency, or part of the transaction.

We think the decision of the referee was warranted by the facts before him, and that the judgment appealed from should be affirmed.¹

All concur.

*Judgment affirmed.*²

SMITH v. SMITH

COURT OF APPEALS OF NEW YORK, 1891

(125 N. Y. 224)

O'BRIEN, J. The plaintiff sought by this action to compel the defendant, who is his wife, to convey to him certain real estate of which she holds the title, or to have a lien in his favor declared thereon. The courts below have held that he was entitled to the lien, but not to the conveyance, and as there is no appeal except by the defendant, it is only necessary to examine the grounds upon which the right to such lien was based.

In the year 1863 the plaintiff was the owner of the real estate described in the complaint, and concerning which the relief was demanded. On the twenty-first of September in that year he conveyed it through a third party to the defendant, who has ever since held the title, though the plaintiff has managed it and collected the rents and applied what was not expended in the payment

¹ Compare *Bright v. Boyd*, 1 Story, 478 (1841), in which improvements made by a *bona fide* purchaser of land whose title proved defective were allowed as "a lien and charge on the estate."—*Per* STORY, J., 2 Story, 608.

² In *Hamilton Trust Co. v. Clemes*, 163 N. Y. 423 (1900), *held*, a mortgage given by a corporation in an effort to perform a legal obligation to give a first mortgage upon its

assets under a contract entered into by the original directors of the corporation with another corporation, which contract is fully performed on its part, is valid in equity as against junior judgment creditors, even though there was a failure on the part of the corporation to observe certain statutory requirements. The principal case and *Chase v. Peck*, *supra*, were chiefly relied upon by the court. (See opinion, pp. 423-9.)

of taxes, insurance and necessary repairs to the support of the family. The consideration expressed in the deed is \$25, but it is quite evident that it was a voluntary transfer of the property by the husband to the wife without consideration, and for the purpose of better securing its benefits to the family. The parties to this action have ever since resided upon the property as husband and wife, renting such portions of it as were not necessary for their own use.

It was found by the Special Term, upon sufficient evidence, that in the spring of 1879 the plaintiff informed the defendant, his wife, that he had some money in the bank drawing only three and a half per cent interest, and that by using it in building a block on a portion of the premises he could realize a larger income from this money. The defendant replied that it would be a good thing; that he could go on and build there, and that "if he got any ways distressed in any shape or manner he had a right to sell the block; that it was at his disposal at any time." The plaintiff replied that it was all right, and that he would go on and build it. It is also found that relying upon this arrangement the plaintiff, with his own means, and at an expense of \$4,500, constructed a brick block upon a portion of the land which enhanced its value to the extent of the sum so expended, and that the management of the property ever since by the plaintiff, the collection and receipt of the rents, and the disposition made by him of the same, was with the defendant's knowledge and consent. It was held that the plaintiff was entitled to have a lien declared upon the land for the sum so expended by him with interest thereon from March 1, 1887, the date when the plaintiff ceased to collect the rents in consequence, apparently, of some disagreement between the parties. We think that the judgment is correct. It would be contrary to equity to permit the defendant, under the circumstances, to hold the property without subjecting it as security in some form to the expenditures made upon it with her knowledge and consent. She was informed by her husband that he had money invested at low interest which could be used in improving the property in such way as to yield a much larger income to him. From what was said she is chargeable with knowledge of his intentions to expend the money only for the purpose of making a more profitable investment, and with this knowledge on her part she permitted him to erect the building. Unless the transaction gave him some claim or lien upon the property he had, of course, no investment at all after he drew the money from the bank and used it in the construc-

tion of the block. The defendant had no right to understand from what was said that her husband intended to make a gift of the money to her by expending it upon the property. What was said and done amounted to an assent on the part of the wife, that in case the husband used the money in constructing the block on the land, of which she was the owner, his money would, at least, be as safe to him as it was before. Her remark that he had the right to dispose of the block at any time in case he became in any way distressed, has no point or significance unless it is construed as an assent on her part that he was to have a lien, and, consequently, a right to sell in virtue of the expenditure which he contemplated making upon the property. The transaction was, in substance, an agreement on her part to give such a lien in case the expenditure was made.

Upon the findings made by the trial court, the plaintiff, acting in good faith, and in reliance upon this promise, expended his money, and the defendant has had the full benefit thereof, so that in equity she ought to pay for the same.

We do not conceive it to be necessary to quote at length from the elementary books upon equity jurisprudence, or from the adjudged cases the language in which the principles are expressed that sustain the judgment in this case. A citation of these authorities is sufficient. (1 Story Eq. Juris., § 388; 2 *id.*, § 1237; 3 Pom. Eq. Juris. 233; *King's Heirs v. Thompson*, 9 Pet. 204; *Chase v. Peck*, 21 N. Y. 581; *Freeman v. Freeman*, 43 *id.* 34; *Hale v. Bank*, 49 *id.* 627; *Husted v. Ingraham*, 75 *id.* 255; *Perry v. Board*, 102 *id.* 99.)

It is urged in support of this appeal that the husband cannot invoke the power of a court of equity for the purpose of obtaining relief until he first does equity by accounting to her for the rents received by him, and which were used for the support of the family, an obligation which the law imposes upon the husband alone. That point was not specifically raised at the trial, and for that reason alone should not now prevail to reverse the judgment. It does not appear, however, what sum, if any, remained of the rents after the payment of taxes, insurance, repairs and interest on the \$4,500. That balance, whatever it was, is all that can be said to have been used by the husband for the payment of family expenses. It was the income of property that formerly belonged to the husband, and which he deeded to the wife without consideration, and it was accepted by her, evidently, with the tacit understanding on both sides that the income should be used as it had been before, and as it actually was used to some extent, for the benefit of the family.

This is apparent from the conduct of the parties, for the husband, notwithstanding the conveyance, continued to manage the property and collect and use the rents as if the transfer had never been made, and in this, so far as appears, the wife acquiesced. The wife having assented to the disposition which her husband made of the rents, cannot now change her position and ask him to account to her therefor. His application of some part of the rents to the support of the family was not, under all the circumstances, inequitable as against his wife, but her refusal to give him a lien or security for the money expended in building upon the property was. This favorite maxim of equity does not, as it seems to us, apply to this case. An agreement to give a lien upon land to secure money to be expended in improving it, followed by an actual expenditure of the money, and the improvement contemplated, is so far performed that equity does not regard the Statute of Frauds as a defense to an action to enforce the agreement. (*Freeman v. Freeman, supra; Burdick v. Jackson*, 7 Hun, 488; Pom. Specif. Perf., § 30.)

We think the judgment is based upon correct principles, and that it should be affirmed, with costs.

All concur, except RUGER, Ch. J., and FINCH, J., dissenting.

*Judgment affirmed.*¹

¹ In *Sprague v. Cochran*, 144 N. Y. 104 (1894), O'BRIEN, J., said at pages 112-113: "There can be no doubt upon the authorities that where one party advances money to another upon the faith of a verbal agreement by the latter to secure its payment by a mortgage upon certain lands, but which is never executed, or which, if executed, is so defective or informal as to fail in effectuating the purpose of its execution, equity will impress upon the land intended to be mortgaged a lien in favor of the creditor who advanced the money for the security and satisfaction of his debt. This lien attaches upon the payment of the money and, unless there is a waiver of it, express or implied, remains and may be enforced so long as the debt itself may be enforced, and no waiver can be implied from the act of the creditor in receiving a

mortgage which by reason of fraud, inadvertence or mistake is not effectual to secure specific lien on the lands or any part of them, nor is this lien merged in any such instrument subsequently executed. *De Peyster v. Hasbrouck*, 11 N. Y. 582; *Payne v. Wilson*, 74 id. 348; *Coman v. Lakey*, 80 id. 345; *Husted v. Ingraham*, 75 id. 251; *Haverly v. Becker*, 4 id. 169; *Glacken v. Brown*, 39 Hun, 294; *Lanning v. Tompkins*, 45 Barb. 308; *Matter of Howe*, 1 Paige, 125; *Smith v. Smith*, 125 N. Y. 224; *Hoag v. Town of Greenwich*, 133 id. 152. . . . The doctrine of equitable mortgage is not limited to written instruments intended as mortgages, but which by reason of formal defects cannot have such operation without the aid of the court, but also to a very great variety of transactions to which equity attaches that character. It is not necessary that such transac-

SCHOENHERR v. VAN METER

COURT OF APPEALS OF NEW YORK, 1915

(215 N. Y. 548)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered July 30, 1913; affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

CARDOZO, J. The plaintiff is a member of the bar. He brings this action to impress a lien on property of the Brooklyn Consolidated Drug Company, recovered through his services. One Wischerth, the treasurer and general manager, had misappropriated the property of the corporation and owed it upwards of \$26,000. The plaintiff was retained by a director to compel the delinquent officer to account. The director refused to be personally liable for the fees. He agreed, however, that the plaintiff should have a lien on the cause of action and on any property recovered. This agreement was found by the trial court, and the finding has been unanimously affirmed. Under that retainer, an action was brought to compel Wischerth to account for his official conduct in the management and disposition of the funds and property committed to his charge, to compel him to pay over the moneys found due upon such accounting, or the value of any property misappropriated to his own use, or lost or wasted by the violation of his duty. That is an action which a director has the right to maintain (General Corp. Law, secs. 90, 91, formerly Code Civ. Pr. sec. 1781; *Miller v. Quincy*, 179 N. Y. 294). After the action was begun Wischerth gave to the corporation money and other

tions or agreements as to lands should be in writing in order to take them out of the operation of the Statute of Frauds for two reasons, first, because they are completely executed by at least one of the parties and are no longer executory, and, secondly, because the statute by its own terms

does not affect the power which courts of equity have always exercised to compel specific performance of such agreements. (2 R. S. 134, § 10; *Smith v. Smith*, *supra*; *Beardsley v. Duntley*, 69 N. Y. 577.)"

To similar effect, *Dean v. Anderson*, 34 N. J. Eq. 496 (1810).

property of value in discharge of his liability. The finding, unanimously affirmed, is that the money was paid and the property delivered as a result of the director's action and by reason of the services rendered by the plaintiff therein. The finding also is that the value of the services is \$1,000. The corporation, appropriating the benefit of the services, refuses to compensate the plaintiff, and resists his effort to establish a lien on the proceeds of the suit.

We think the lien should be sustained. We assume, in accordance with our decision in *Matter of Meighan* (106 App. Div. 599; 182 N. Y. 558), that the statutory lien created by section 475 of the Judiciary Law for the benefit of an attorney is not enforceable under such conditions. That case was a proceeding by petition under the statute. The court held that in a suit by a stockholder for the benefit of a corporation, the statutory lien of the attorney does not attach to the money paid to the corporation perforce of the judgment. This case presents a very different situation. We are not now dealing with a statutory lien to be enforced in a statutory proceeding. We are dealing with a lien independent of statute, to be enforced in a plenary suit in equity. The director who was the plaintiff in the accounting suit might have paid the attorney with his own money. If he had done so, he would have had a lien for his own reimbursement on the property recovered to the use of the corporation as a result of his action. The rule is that a trust fund bear the expenses of its administration, and that a trustee who conducts a litigation to protect the subject of the trust, has a charge on the fund for expenses incurred in the performance of his duties (*Woodruff v. N. Y., L. E. & W. R. R. Co.*, 129 N. Y. 27; *Meddaugh v. Wilson*, 151 U. S. 333, 343; *Central R. R. & B. Co. of Ga. v. Pettus*, 113 U. S. 116). The law which imposes on a director the duty to hold a delinquent officer to account (*Miller v. Quincy, supra*), does not deny him indemnity for the expenses of the accounting. The lien enforceable by this plaintiff, is not, therefore, the statutory lien of an attorney. It is a contractual lien, acquired by succession to the potential lien of the plaintiff in the action for an accounting. The plaintiff in that action, instead of paying the attorney with his own money, and seeking reimbursement out of the fund, chose another and for himself a safer course. He refused to assume personal liability for the attorney's services, but agreed that the attorney should have a lien on the cause of action and its proceeds. That was a lawful contract. It was a contract for the transfer to the attorney of the

equitable lien of the trustee (*New v. Nicoll*, 73 N. Y. 127, 131). A trustee, who is unwilling to assume personal liability for services essential to the protection of the trust, has the power, if other funds fail, to create a charge, equivalent to his own lien for reimbursement, in favor of another by whom the services are rendered (*Noyes v. Blakeman*, 6 N. Y. 567, 579; *New v. Nicoll*, *supra*). That is exactly what this director undertook to do. We think a court of equity will give effect to his engagement. The plaintiff rendered services of value, which the corporation has appropriated without requital. The plastic remedy of an equitable lien is adequate in such a case to prevent a failure of justice (*Perry v. Board of Missions*, 102 N. Y. 99, 105; *Meighan v. Am. Grass Twine Co.*, 154 Fed. Rep. 346).

The point is made that relief must be denied the plaintiff because since this action was begun, the corporation was adjudged a bankrupt, and the trustee in bankruptcy substituted as a defendant. In such circumstances, the trustee's title is subject to the plaintiff's equitable lien, and to the pending action to foreclose it (*Metcalf v. Barker*, 187 U. S. 165; *Pickens v. Roy*, 187 U. S. 177). It may be that the state court is without power to take the fund from the possession of the court of bankruptcy (*Skilton v. Coddington*, 185 N. Y. 80, 85, 86; *Frank v. Volkommer*, 205 U. S. 521, 529). It has power, however, in this action, to which the trustee has voluntarily become a party, to declare the rights and interest of the litigants in the subject-matter of the controversy. "We may assume," as we said in *Skilton v. Coddington* (*supra*), "that the bankruptcy court will give effect to any judgment recovered therein."

The facts essential to the plaintiff's case are established by the findings. A new trial is, therefore, needless (Code Civ. Pro., sec. 1337; *Farleigh v. Cadman*, 159 N. Y. 169). The judgment should be reversed; the plaintiff should be decreed to have a lien upon the sum of \$3,500 in the hands of the trustee in bankruptcy, the proceeds of notes and mortgage transferred by Wischerth to the corporation; the amount of the lien should be fixed at \$1,000 with interest from September 6, 1911, and costs of this action in all courts; and there should also be a personal judgment in favor of the plaintiff for the amount of any deficiency remaining after the lien has been enforced.

WILLARD BARTLETT, Ch. J., WERNER, COLLIN, CUDDEBACK, MILLER and SEABURY, JJ., concur.

Judgment reversed, etc.

NEW YORK REAL PROP. LAW, § 260. *Effect of Grant or Mortgage of Real Property Adversely Possessed.*—A grant of real property is absolutely void unless the same shall be made to the people of the state of New York, if at the time of the delivery thereof such property is in the actual possession of a person claiming under a title adverse to that of the grantor; but such possession does not prevent the mortgaging of such property, and such mortgage, if duly recorded, binds the property from the time the possession thereof is recovered by the mortgagor or his representatives, and has preference over any judgment or other instrument, subsequent to the recording thereof; and if there are two or more such mortgages, they severally have preference according to the time of recording thereof, respectively.

CHAPTER I. (*Continued*)

SECTION IV.—MORTGAGES BY ESTOPPEL

ROTHSCHILD *v.* TITLE GUARANTEE AND TRUST CO.

COURT OF APPEALS OF NEW YORK, 1912

(204 N. Y. 458)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered August 4, 1910, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

COLLIN, J. The plaintiffs as the executrices and devisees under the probated will of Caroline Strauss demand a judgment compelling the defendant to cancel and discharge of record a mortgage, in form, held by it upon premises owned by the testatrix at the time of her death and devised to them. The mortgage, dated and recorded November 6, 1899, purported, on its face, to have been executed by Caroline Strauss and Baldwin F. Strauss, her husband, to the defendant to secure their bond of even date for \$2,000, to mature November 6, 1902, with interest from its date to be paid April 1, 1900, and thereafter semi-annually. Caroline Strauss did not execute, and was wholly ignorant of the negotiations for and giving of the instruments. Her name thereon was forged. Baldwin F. Strauss, the son of Caroline, negotiated the loan, effected the execution of the bond and mortgage and received the \$2,000 paid by the defendant in two checks to the order of Caroline Strauss and Baldwin F. Strauss. He was an attorney in Brooklyn, receiving an income of several thousands of dollars a year and of good reputation until his disappearance in March, 1903. About one year after the making of the loan, Caroline acquired full knowledge that it had been made upon the security of the said instruments and that her signature had been forged thereon by the

procurement of Baldwin, and, having such knowledge, on or about November 27, 1900, caused to be paid to the defendant out of her own moneys the six months' interest due October 1, 1900, and on or about May 1, 1901, caused to be paid to the defendant out of her own moneys the interest which then became due. Each other interest payment up to and including that which became due October 1, 1904, was made at or soon after its maturity, but it does not appear in the defendant's books of account, duly kept in the ordinary course of its business, who made any of the payments, including those caused to be made by Caroline. Caroline died December 21, 1903. Soon after October 28, 1904, the defendant acquired its first knowledge or notice of the forgeries, and refused upon the demand of the plaintiffs to surrender the mortgage. Since Baldwin F. Strauss' disappearance, defendant has made diligent search and inquiry for him and has learned that he left the state, but has been unable to discover his whereabouts or whether he is still alive. The trial court rendered its judgment, which the Appellate Division affirmed, that the mortgage was a cloud upon the plaintiffs' title and should be discharged and surrendered by the defendant. The appellant contends that the facts as found did not authorize the judgment.

A principle of law is: Where a person wronged is silent under a duty to speak, or by an act or declaration recognizes the wrong as an existing and valid transaction, and in some degree, at least, gives it effect so as to benefit himself or so as to affect the rights or relations created by it between the wrongdoer and a third person, he acquiesces in and assents to it and is equitably estopped from impeaching it. The principle is applicable to the facts found and requires the reversal of the judgment.

When Caroline Strauss acquired, about one year after the transaction between the defendant and her son, full knowledge of the facts constituting the transaction, the right of action to compel the defendant to discharge the mortgage was vested in her. It was a cloud upon her title to the lands it described, impeachable only by extrinsic evidence proving that it was not her act or deed and was executed without her knowledge or authority. Nor did the protection of her property lie solely in that right of action. She might have defended against an attempted enforcement of it by foreclosure, upon the facts constituting her right of action for its cancellation. (*Viele v. Judson*, 82 N. Y. 32.) She did not lose this right of action or protection by her silence. The law does not withdraw its remedies from a person against whom a wrong is com-

mitted merely because he in silence and without proclamation or complaint recognizes and endures the wrong. Mere silence or passivity on the part of Caroline would not have precluded her from the remedies protective against the effects of the forged instruments. Her silence instigated no action and caused no wrong. A fraudulent purpose or a fraudulent result lies at the basis of the doctrine of equitable estoppel through silence or inaction. Actual or intended fraud is not an element essential to it. Neither affirmative acts or words nor silence maintained with the fraudulent intention of deceiving are indispensable elements of it. But it arises only when, relatively to the party invoking it or his privies, the omission to speak is an actual or constructive fraud. Its existence requires that the party against whom it acts remained silent when he had the opportunity of speaking and when he knew or ought to have known that his silence would be relied upon, and that action would be taken or omitted which his statement of the truth would prevent, and that injury of some nature or in some degree would result. (*Thompson v. Simpson*, 128 N. Y. 270; *Collier v. Miller*, 137 N. Y. 332.) Caroline had not information or notice that the mortgage was to be given, did not participate in the transaction and committed or omitted no act moving the defendant to enter into it. She could not speak in regard to it. Under the principles we have enunciated, her silence after she first heard of it did not equitably estop her from impeaching it.

The payments of interest by Caroline worked a different result. the transaction of which the forged mortgage was a part created rights and relations between the defendant and Baldwin F. Strauss. The defendant, from the moment the checks it gave Baldwin were paid, might, had it been conscious of the truth, have availed itself of civil remedies for the recovery from him of the \$2,000; it might also, by its complaint and information, have subjected him to prosecution criminally. The right of seeking restoration and payment from the person who accomplished or procured the forgeries was in itself a substantial and valuable one. (*Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96; *Continental National Bank v. National Bank of the Commonwealth*, 50 N. Y. 575.) Caroline could not by act or declamation diminish or thwart that right and not incur responsibility. The defendant was entitled to have it and the relations between itself and Baldwin F. Strauss remain unaffected by any act or interference on her part. It believed that the apparent lien upon her property created by the mortgage apparently signed and acknowledged by her secured

the payment of the \$2,000 it had advanced under the belief. She knew such fact and the further fact that her signature was a forgery. The right to foreclose the lien securing the interest, upon a default in its payment, is usual and ordinary, and, it may be presumed, such fact was likewise known to her. We are not required to consider what results an action for the foreclosure of the mortgage, because of a default in the payment of interest due October 1, 1900, would have produced. A reasonable, if not necessary, inference would seem to be that a disclosure of the forgery or a completed foreclosure would be consequent. It is sufficient, however, for the purposes of our review that, if the interest had not been paid, the right to foreclosure would have arisen and that she having full knowledge of the facts paid the interest and thus prevented the upspringing of the right and the exercise of it by the defendant. (*Continental Nat. Bank v. National Bank of the Commonwealth*, 50 N. Y. 575; *Voorhis v. Olmstead*, 66 N. Y. 113.) She by making the payments recognized the mortgage and the lien it seemed to create as real and existing, extended their existence and retarded or intercepted the natural growth and development of the rights and relations between the defendant and her son, and benefited her son and, presumptively, with her contemplation, herself. She could not be permitted to thereafter repudiate the mortgage. The payments of the interest made by her and their effects, and a subsequent repudiation of the mortgage by her would be inconsistent with each other, would not be responsive to the demands of justice and good conscience and would effect a fraudulent result. When a party with full knowledge, or with sufficient notice of his rights and of all the material facts, freely does what amounts to a recognition or adoption of a contract or transaction as existing, or acts in a manner inconsistent with its repudiation, and so as to affect or interfere with the relations and situation of the parties, he acquiesces in and assents to it and is equitably estopped from impeaching it, although it was originally void or voidable. (*Vohmann v. Michel*, 185 N. Y. 420; 2 Pomeroy's Equity Jurisprudence [3d ed.], sections 816-821, 965.)

It is not necessary that an equitable estoppel rest upon a consideration or agreement or legal obligation. The courts apply it, in accordance with established general principles, in order that the transactions and dealings may result justly and fairly with the parties concerned with them; and it operates against an unjust repudiation of a sealed or a forged instrument. It does not require the positive, distinct action or language needed and intended to

renew and ratify a transaction and make it valid and binding; it prohibits a person, upon principles of honesty and fair and open dealing, from asserting rights, the enforcement of which would, through his omissions or commissions, work fraud and injustice. It would have prohibited Caroline from maintaining in her lifetime this action, and manifestly the right of the plaintiff is only that held by her.

The judgment should be reversed and a new trial granted, with costs to abide the event.

CULLEN, Ch. J., GRAY, HAIGHT, VANN and HISCOCK, JJ., concur; WERNER, J., dissents.

Judgment reversed, etc.

PEOPLE'S TRUST CO. v. SMITH

COURT OF APPEALS OF NEW YORK, 1915

(215 N. Y. 488)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department entered March 3, 1913, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

CARDOZO, J. The defendants Smith delivered to the defendant George F. Stainton, described in the record as George F. Stainton, No. 1, a bond and mortgage to secure a debt of \$3,000. The mortgagee had a nephew of the same name, who is a member of the bar. He is described in the record as George F. Stainton, No. 2. The uncle placed the bond and mortgage, with other papers, in a separate bundle, and left them, solely for safekeeping, in the safe in the nephew's office. The nephew purloined the bond and mortgage, and attempted to assign them to the plaintiff, the People's Trust Company. He executed, in his own handwriting, a document in the form of an assignment, and on that security obtained from the plaintiff a loan of \$2,000. The payment of the loan was guaranteed by the defendant Ward. The bond and mortgage were delivered to the plaintiff together with the assignment. Stainton, No. 1, had no knowledge of the transaction. His good faith is conceded. The good faith of the plaintiff and of Ward, the guar-

antor, is also conceded. The question to be determined is the incidence of the loss.

The trial judge held that Stainton, No. 1, had intrusted the custody of the bond and mortgage to Stainton, No. 2, and had estopped himself, because of the identity of their names, from denying the title of the custodian. The estoppel was held to be effective, however, only to the extent necessary to save the trust company from loss. The trust company had a remedy against the guarantor, Ward, who was found to be amply solvent. The trial judge held, therefore, that the enforcement of the mortgage was unnecessary for its protection, and on that ground gave judgment dismissing the complaint. The Appellate Division affirmed without opinion.

We think the dismissal of the complaint was proper, but we place our decision on other grounds than those that controlled the judgment in the court below. In our view, Stainton, No. 1, has done nothing that estops him from asserting his ownership of the bond and mortgage. It is conceded that this would be true if the uncle and nephew had borne different names. We think it does not cease to be true because they bear the same name. An owner who intends to put the title in the name of another rather than in his own name, may lose his ownership by estoppel. (*Moore v. Met. Nat. Bank*, 55 N. Y. 41.) But no such case is before us here. This owner never intended anything of the kind. The name George F. Stainton as used in this bond and mortgage was not intended to be the symbol of any one except himself. (*First N. Bank v. Am. Ex. Nat. Bank*, 170 N. Y. 88, 90; *Graves v. Am. Ex. Bank*, 17 N. Y. 205; *Shipman v. Bank of State of New York*, 126 N. Y. 318, 330; *Seaboard Nat. Bank v. Bank of America*, 193 N. Y. 26.) There was no purpose to clothe the custodian with the indicia of ownership. Estoppel, therefore, cannot be built in this case upon any representation that was *intended* by the true owner. It must be built, if at all, upon the owner's negligence. To make out an estoppel on that ground, it is not enough to show that the owner was careless. He must have been careless in respect of some duty owing to the plaintiff or the public. (*Knox v. Eden Musee Am. Co.*, 148 N. Y. 441, 462; *Swan v. N. B. Australasian Co.*, 2 H. & C. 181.) Neither of these elements is present in the case at hand.

The bond and mortgage were not accompanied by any blank form of transfer, signed by the true owner. There was nothing about them to indicate that any transfer was contemplated. They were the expression of a static condition, of a "right at rest"

rather than a "right in motion" (Holland, *Elements of Jurisprudence*, p. 132). It was possible, of course, that the custodian might personate the mortgagee and forge an assignment. The same thing would have been possible, though perhaps more difficult, if the names had been different. It is not to be overlooked that the nephew's act, though he used his own name, was none the less a forgery. (*Graves v. Am. Ex. Bank*, 17 N. Y. 205; *People v. Peacock*, 6 Cow. 72; *Third Nat. Bank v. Merchants' Nat. Bank*, 76 Hun, 475, 478; Penal Law, section 883.) The owner was not at fault for failing to protect himself or the public against the consequences of such a crime. Many cases, not to be distinguished in principle, sustain that conclusion. *Shepard & Morse Lumber Co. v. Eldridge* (171 Mass. 516, 528) was a case where the holder of an unindorsed check left it with a clerk who, if care had been used, would have been known to be dishonest. The clerk forged the indorsement. The court held that the employer had not lost his remedy through negligence. "He has the right to assume that his clerk will not commit a crime, and to rest upon the presumption that he has not stolen or forged, and will not do so, and he is under no legal obligation, either to the drawer of the check or to the public, to see to it that the check is not put in circulation with a forged indorsement." (*Shepard & Morse Lumber Co. v. Eldridge*, *supra*, at p. 528; to the same effect, *Varney v. Curtis*, 213 Mass. 309, 312.) Faith in the honesty of trusted friends and relatives is seldom negligence. If circumstances may make it negligence, this case does not show them. We may say, with BOVILL, Ch. J., in *Société Générale v. Metropolitan Bank, Ltd.* (27 L. T. 849, 856): "Persons are not to be supposed to commit forgery, and the protection against such a crime is the law of the land, and not the vigilance of parties in excluding all possibility of committing it," and with BRETT, J., in the same case (p. 858): "There is no duty on any one to suppose that those, against whose character there is no imputation, will commit forgery whenever the opportunity arises." (See, also, *Knox v. Eden Musee Am. Co.*, *supra*, at p. 460; *Scholfeld v. Earl of Londesborough*, L. R. [A. C. 1896] 514; *Baxendale v. Bennett*, L. R. [3 Q. B. D.] 525, 530; *Colonial Bank v. Marshall*, L. R. [A. C. 1906] 559; *Longman v. Bath Electric Tramways, Ltd.*, L. R. [1 Ch. 1905] 646; *Smith v. Prosser*, L. R. [2 K. B. 1907] 735, 746.)

We think, therefore, that the owner was not negligent in leaving his bond and mortgage with a nephew of the same name. But if there was any negligence, the transaction was not one that made

care and diligence a duty. This court in *Knox v. Eden Musee Am. Co.* (p. 462, *supra*) adopted the words of BLACKBURN, J., in *Swan v. N. B. Australasian Co.* (2 H. & C. 182): "The neglect must be in the transaction itself, and be the proximate cause of leading the party into the mistake; and also, as I think, that it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy." The nature of this transaction did not charge the owner with any duty to the public. (*Varney v. Curtis*, 213 Mass. 309, 312.) It is true, of course, in a broad sense that by intrusting his bond and mortgage to the nephew he made possible the fraud. That would be equally true if he had intrusted the nephew with the custody of diamonds. Indeed, the wrongful sale of diamonds, passing, as they do, from hand to hand, is probably the easier crime and one more readily to be foreseen. But the mere possession of a chattel with the permission of the owner does not enable the possessor to transfer a title by estoppel. What is true of a chattel is true equally of things in action. (*Varney v. Curtis, supra*; *Northern Counties, etc., Fire Ins. Co. v. Whipp*, L. R. [26 Ch. D.] 482, 493.) The bond and mortgage were not delivered to the agent to be dealt with or disposed of; they were delivered for safekeeping. They were not delivered in a form which involved a representation to the public that any transfer was in view. A transfer was not invited; it was not authorized; and it could be accomplished only through a crime. An owner does not forfeit his ownership for failing to take good care of a bond and mortgage any more than he forfeits it for failing to take good care of his watch.

We are asked to apply to this case the rules of estoppel that govern the assignment of stock certificates (*McNeil v. Tenth Nat. Bank*, 46 N. Y. 325), and some other commercial documents (*Bank of Batavia v. N. Y., L. E. & W. R. R. Co.*, 106 N. Y. 195, 199; *Bank of N. Y. N. B. Assn. v. Am. D. & T. Co.*, 143 N. Y. 559; *Coventry v. G. E. Ry. Co.*, L. R. [11 Q. B. D.] 776), when indorsed in blank. The supposed analogy is deceptive. "A blank indorsement of such an instrument signifies that some person is expected to have the right to fill in the blank." (*Scollans v. Rollins*, 179 Mass. 346, 352.) The owner who intrusts to another a stock certificate thus indorsed has given currency to an instrument which connotes

by its very form a contemplated transfer. In such circumstances, if the agent proves to be dishonest, the owner must bear the loss. (*Nat. Safe Dep. S. & T. Co. v. Hibbs*, 229 U. S. 391; *Union Trust Co. of Rochester v. Oliver*, 214 N. Y. 517; *McNeil v. Tenth Nat. Bank*, *supra*.) But there is no such implication in the delivery of a bond and mortgage. The suggestion of a future transfer is not immanent in the transaction. It is not more immanent in the delivery of a bond and mortgage than in the delivery of a horse. The law of stock certificates has been developed in view of their character as commercial instruments, designed by their very form, when indorsed in blank, to be freely accepted in the market. (*Bank v. Lanier*, 11 Wall. 369, 377; *Nat. S. D. S. & T. Co. v. Hibbs*, *supra*; *Am. Ex. Nat. Bank v. Woodlawn Cemetery*, 194 N. Y. 116.) They are issued in the expectation that they will be "used in the ordinary channels of business, and be relied upon as evidence of ownership or security for advances." Those thus trusting to them and affected by them "are not accidentally injured," but have done what those who issued the certificate "had every reason to expect." (*Bank of Batavia v. N. Y., L. E. & W. R. R. Co.*, *supra*.) There is little analogy between a commercial document with an indorsement which, by commercial usage, is an invitation to purchase it, and a bond and mortgage unaccompanied by any instrument of transfer. (*Rapps v. Gottlieb*, 142 N. Y. 164.)

Our conclusion is that the title of the elder Stainton has never been divested.

The judgment should be affirmed, with costs.

WILLARD BARTLETT, Ch. J., WERNER, HISCOCK, CHASE, COLLIN and MILLER, JJ., concur.

Judgment affirmed.

CHAPTER II

SECURITY

SECTION I.—MORTGAGE AND CONDITIONAL SALE

ST. JOHN *v.* WAREHAM

COURT OF CHANCERY, 1635

(3 *Swanst.* 631)

THE defendants, for 3000*l.*, conveyed the lands to Sir Richard Grobham and his heirs; Sir Richard made a lease to Wareham, rendering to him and his heirs 230*l.* per annum, and this lease was for seven years, with a *nomine poenæ* distress and clause of re-entry, and a proviso, that if Wareham and his heirs should within seven years be desirous to repurchase, and signify the same to Sir Richard Grobham, his heirs and assigns, and pay them 3000*l.*, then he and they to assure to Wareham. *Lord Coventry, Richardson*, Chief Justice, and *Crook*, decreed the money to the heir of Sir Richard G., and not to the plaintiff, Saint John, who was his executor, and justly; for this was not the case of a mortgage, but of an absolute purchase; for the proviso could not turn it to a mortgage, but was a mere collateral agreement, for which there was no remedy in equity after the seven years. And so it was ruled in this court, 16 Car. 2, *Cage v. Sir Ralph Bovy*; and again, T. 24 Car. 2, in *Isaac Cottington v. Lord Cornbury*, where the covenant was to reconvey, upon the repayment of the purchase money within seven years. But if the purchase money had not been near the value of the land, that and such like circumstances might have made it a mortgage.—*Per* Lord Nottingham, L. Ch., in *Thornborough v. Baker*, 3 *Swanst.* 628.¹

¹ And see, *Mellor v. Lees*, 2 Atk. 494 (1742); *Longuet v. Scawen*, 1 Ves. Sr. 402, 405 (1749).

CONWAY v. ALEXANDER

SUPREME COURT OF THE UNITED STATES, 1812

(7 Cranch, 218)

THIS was an appeal from the Circuit Court for the District of Columbia, sitting in Chancery, at Alexandria.¹

MARSHALL, Ch. J., delivered the opinion of the Court as follows:

This suit was brought by Walter S. Alexander, as devisee of Robert Alexander, to redeem certain lands lying in the neighborhood of Alexandria, which were conveyed by Robert Alexander, in trust, by deed dated the 20th of March, 1788, and which were afterwards conveyed to William Lyles, and by him to the testator of the plaintiffs in error.

The deed of the 20th of March, 1788, is between Robert Alexander of the first part, William Lyles of the second part, and Robert T. Hooe, Robert Muire and John Allison of the third part. Robert Alexander, after reciting that he was seised of one undivided moiety of 400 acres of land, except 40 acres thereof previously sold to Baldwin Dade, as tenant in common with Charles Alexander, in consideration of eight hundred pounds paid by William Lyles, and of the covenants therein mentioned, grants, bargains and sells twenty acres, part of the said undivided moiety, to William Lyles, his heirs, and assigns forever, and the residue thereof, except that which had been previously sold to Baldwin Dade, to the said Robert T. Hooe, Robert Muire and John Allison, in trust, to convey the same to William Lyles at any reasonable time after the first day of July, 1790, unless Robert Alexander shall pay to the said William Lyles, on or before that day, the sum of £700 with interest from the said 20th day of March, 1788. And if the said Robert Alexander shall pay the said William Lyles on or before that day the said sum of £700 with interest, then to reconvey the same to the said Robert Alexander. Robert Alexander further covenants that, in the event of a reconveyance to him, the said twenty acres sold absolutely shall be laid off adjoining the tract of land on which William Lyles then lived. The trustees covenant to convey to William Lyles, on the non-payment of the said sum of £700; and to reconvey to Robert Alexander in the event of payment. Robert Alexander covenants for further assurances as to

¹ The statement of facts is omitted.

the 140 acres, and warrants the twenty acres to William Lyles and his heirs.

On the 19th day of July, 1790, the trustees, by a deed in which the trust is recited, and that Robert Alexander has failed to pay the said sum of £700, convey the said land in fee to William Lyles. On the 23d of August, 1790, William Lyles, in consideration of £900, conveyed the said twenty acres of land and 140 acres of land to Richard Conway, with special warranty against himself and his heirs. On the 9th day of April, in the year 1791, a deed of partial partition was made between Richard Conway and Charles Alexander. This deed shows that Charles Alexander asserted an exclusive title in himself to a considerable part of this land. Soon after this deed of partition was executed Richard Conway entered upon a part of the lands assigned to him, and made on them permanent improvements of great value and at considerable expense.

In January or February, 1793, Robert Alexander departed this life, having first made his last will in writing, in which he devises the land sold to Baldwin Dade; but does not mention the land sold to William Lyles. The plaintiff, who was then an infant, and who attained his age of twenty-one years in November, 1803, brought his bill to redeem in 1807. He claims under the residuary clause of Robert Alexander's will. *by his father*

The question to be decided is whether Robert Alexander, by his deed of March, 1788, made a conditional sale of the property conveyed by that deed to trustees, which sale became absolute by the non-payment of £700, with interest, on the 1st of July, 1790, and by the conveyance of the 19th of that month, or is to be considered as having only mortgaged the property so conveyed. *1*

To deny the power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of lands defeasible by the payment of money at a future day, or, in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price and at a specified time, would be to transfer to the Court of Chancery, in a considerable degree, the guardianship of adults as well as of infants. Such contracts are certainly not prohibited either by the letter or the policy of the law. But the policy of the law does prohibit the conversion of a real mortgage into a sale. And as lenders of money are less under the pressure of circumstances which control the perfect and free exercise of the judgment than borrowers, the effort is frequently made by persons of this description to avail themselves of the advantage of this superiority, in order to obtain inequitable *2*

advantages. For this reason the leaning of courts has been against them, and doubtful cases have generally been decided to be mortgages. But as a conditional sale, if really intended, is valid, the inquiry in every case must be, whether the contract in the specific case is a security for the repayment of money or an actual sale.

In this case the form of the deed is not in itself conclusive either way. The want of a covenant to repay the money is not complete evidence that a conditional sale was intended, but is a circumstance of no inconsiderable importance. If the vendee must be restrained to his principal and interest, that principal and interest ought to be secured. It is, therefore, a necessary ingredient in a mortgage that the mortgagee should have a remedy against the person of the debtor. If this remedy really exists, its not being reserved in terms will not affect the case. But it must exist in order to justify a construction which overrules the express words of the instrument. Its existence, in this case, is certainly not to be collected from the deed. There is no acknowledgment of a pre-existing debt, nor any covenant for repayment. An action at law for the recovery of the money certainly could not have been sustained; and if, to a bill in chancery praying a sale of the premises, and a decree for so much money as might remain due, Robert Alexander had answered that this was a sale and not a mortgage, clear proof to the contrary must have been produced to justify a decree against him.

That the conveyance is made to trustees is not a circumstance of much weight. It manifests an intention in the drawer of the instrument to avoid the usual forms of a mortgage, and introduces third persons, who are perfect strangers to the transaction, for no other conceivable purpose than to entitle William Lyles to a conveyance subsequent to the non-payment of the £700 on the day fixed for its payment, which should be absolute in its form. This intention, however, would have no influence on the case, if the instrument was really a security for money advanced and to be repaid.

It is also a circumstance which, though light, is not to be entirely disregarded, that the twenty acres, which were admitted to be purchased absolutely, were not divided and conveyed separately. It would seem as if the parties considered it at least possible that a division might be useless.

3 { Having made these observations on the deed itself the Court will proceed to examine those extrinsic circumstances which are to determine whether it is to be construed a sale or a mortgage.

It is certain that this deed was not given to secure a pre-existing debt. The connection between the parties commenced with this transaction. The proof is also complete that there was no negotiation between the parties respecting a loan of money; no proposition ever made respecting a mortgage. The testimony on this subject is from Mr. Lyles himself and from Mr. Charles Lee. There is some contrariety in their testimony, but they concur in this material point. Mr. Lyles represents Alexander as desirous of selling the whole land absolutely, and himself as wishing to decline an absolute purchase of more than twenty acres. Mr. Lee states Lyles as having represented to him that Alexander was unwilling to sell more than twenty acres absolutely, and offered to sell the residue conditionally. There is not, however, a syllable in the cause, intimating a proposition to borrow money or to mortgage property. No expression is proved to have ever fallen from Robert Alexander before or after the transaction respecting a loan or a mortgage. He does not appear to have imagined that money was to be so obtained; and when it became absolutely necessary to raise money, he seems to have considered the sale of property as his only resource. To this circumstance the Court attaches much importance. Had there been any treaty, any conversation respecting a loan or a mortgage, the deed might have been, with more reason, considered as a cover intended to veil a transaction differing in reality from the appearance it assumed. But there was no such conversation. The parties met and treated upon the ground of sale and not of mortgage. }

It is not entirely unworthy of notice that William Lyles was not a lender of money, nor a man who was in the habit of placing his funds beyond his reach. This, however, has not been relied upon, because the evidence is admitted to be complete that Lyles did not intend to take a mortgage. But it is insisted that he intended to take a security for money, and to avoid the equity of redemption; an intention which a Court of Chancery will invariably defeat. His not being in the practice of lending money is certainly an argument against his intending this transaction as a loan, and the evidence in the cause furnishes strong reason for the opinion that Robert Alexander himself did not so understand it. In this view of the case the proposition made to Lyles, being for a sale and not for a mortgage, is entitled to great consideration. There are other circumstances, too, which bear strongly upon this point. }

The case, in its own nature, furnishes intrinsic evidence of the improbability that the trustees would have conveyed to William

4 Lyles without some communication with Robert Alexander. They certainly ought to have known from himself, and it was easy to procure the information, that the money had not been paid. If he had considered this deed as a mortgage he would naturally have resisted the conveyance, and it is probable that the trustees would have declined making it. 1 This probability is very much strengthened by the facts which are stated by Mr. Lee. The declaration made to him by Lyles, after having carried the deed drawn by Mr. Lee to Mr. Hooe, that the trustees were unwilling to execute it until the assent of Alexander could be obtained, and the directions given to apply for that assent, furnish strong reasons for the opinion that this assent was given.

7 It is also a very material circumstance that, after a public sale from Lyles to Conway, and a partition between Conway and Charles Alexander, Conway took possession of the premises, and began those expensive improvements which have added so much to the value of the property. These facts must be presumed to have been known to Robert Alexander. 1 They passed within his view. Yet his most intimate friends never heard him suggest that he retained any interest in the land. 1 In this aspect of the case, too, 8 the will of Robert Alexander is far from being unimportant. That he mentions forty acres sold to Baldwin Dade, and does not mention one hundred and forty acres, the residue of the same tract, can be ascribed only to the opinion that the residue was no longer his. 1

9 This, then, is a case in which there was no previous debt, no loan in contemplation, no stipulation for the repayment of the money advanced, and no proposition for or conversation about a mortgage. It is a case in which one party certainly considered himself as making a purchase, and the other appears to have considered himself as making a conditional sale. Yet there are circumstances which nearly balance these, and have induced much doubt and hesitation in the mind of some of the court. 1

10 The sale, on the part of Alexander, was not completely voluntary. He was in jail and was much pressed for a sum of money. Though this circumstance does not deprive a man of the right to dispose of his property, it gives a complexion to his contracts, and must have some influence in a doubtful case. The very fact that the sale was conditional implies an expectation to redeem. A conditional sale made in such a situation at a price bearing no proportion on the value of the property would bring suspicion on the whole transaction. The excessive inadequacy of price would in

itself, in the opinion of some of the judges, furnish irresistible proof that a sale could not have been intended. If lands were sold at £5 per acre conditionally, which, in fact, were worth £15, or £20, or £50 per acre, the evidence furnished by this fact, that only a security for money could be intended, would be, in the opinion of three judges, so strong as to overrule all the opposing testimony in the cause.

But the testimony on this point is too uncertain and conflicting to prevail against the strong proof of intending a sale and purchase, which was stated. The sales made by Mr. Dick and Mr. Hartshorne of lots for building, although of land more remote from the town of Alexandria than that sold to Lyles, may be more valuable as building lots, and may consequently sell at a much higher price than this ground would have commanded. The relative value of property in the neighborhood of a town depends on so many other circumstances than mere distance, and is so different at different times, that these sales cannot be taken as a sure guide. That twenty acres, part of the tract, were sold absolutely for £5 per acre; that Lyles sold to Conway at a very small advance; that he had previously offered the property to others unsuccessfully; that it was valued by several persons at a price not much above what he gave; that Robert Alexander, although rich in other property, made no effort to relieve this, are facts which render the real value, at the time of sale, too doubtful to make the inadequacy of price a circumstance of sufficient weight to convert this deed into a mortgage.

It is, therefore, the opinion of the Court that the decree of the Circuit Court is erroneous and ought to be reversed, and that the cause be remanded to that court with directions to dismiss the bill.¹

Decree reversed.

COYLE v. DAVIS, 116 U. S. 108 (1885). "The volume of proof taken on the issue thus raised is large, and the evidence is contradictory, as is common in such cases where, admittedly, a loan of some kind was at some time talked about. The conveyance to Davis of the undivided one-third interest of Coyle, being to him, his heirs and assigns forever, with a covenant of warranty, and without a defeasance, either in the conveyance or in a collateral

¹ See also *Robinson v. Cropsey*, 2 Hall, 22 Mich. 377 (1871); *Hanford Edw. Ch. (N. Y.)* 138 (1833); *Rich v. v. Blessing*, 80 Ill. 188 (1875); *Randall Doane*, 35 Vt. 125 (1862); *Cornell v. v. Sanders*, 87 N. Y. 578 (1882).

paper—the parol evidence that there was a debt, and that the deed was intended to secure it and to operate only as a mortgage, must be clear, unequivocal and convincing, or the presumption that the instrument is what it purports to be must prevail. This well-settled rule of equity jurisprudence was applied by this court in *Howland v. Blake*, 97 U. S. 624, 626. The case stated in the bill herein is not supported by the weight of evidence. On the contrary, it sustains the allegations of the answer. Especially, the force of the letter of Coyle to Davis, of June 11, 1867, is not broken by any satisfactory explanation. It would serve no useful purpose to discuss the testimony at length. There is but one point to which it is needful to refer. Great stress is laid, in cases of this kind, on inadequacy of consideration where there is a considerable disproportion between the price paid and the real value of the property. (*Russell v. Southard*, 12 How. 139, 148.) There is testimony on both sides, on the question of disproportion, in this case. But the preponderance is very large on the part of Davis, that the share of Coyle in the property was sold for about its sale value, in view of its condition. There was a poorly built and poorly arranged building on the premises, which was incapable of actual partition; the law did not permit a partition by a sale *in invitum*, and Coyle's interest was a minority interest. These considerations made it difficult of sale at all.”—*Per Blatchford, J.*

RUSSELL v. SOUTHARD

SUPREME COURT OF THE UNITED STATES, 1851

(12 How. 139)

THIS was an appeal from the Circuit Court of the United States for the District of Kentucky, sitting as a court of equity.

It was a bill filed by Russell, the appellant, to redeem what he called a mortgage, and the question in the case was whether it was a mortgage or conditional sale. The facts are set forth in the opinion of the court. Upon the trial the Circuit Court dismissed the bill, and Russell appealed to this court.

MR. JUSTICE CURTIS delivered the opinion of the court.¹

This is a suit in equity to redeem a mortgage, brought here by appeal from the Circuit Court of the United States for the District of Kentucky.

¹ Portions of the opinion have been omitted.

On the 24th day of September, 1827, Russell, the complainant, conveyed, by an absolute deed in fee-simple, to James Southard, deceased, whose brother and devisee, Daniel R. Southard, is the principal party defendant in this bill, a farm, containing two hundred and sixteen acres, situated about two miles from the city of Louisville. At the time the deed was delivered, and as part of the same transaction, Southard gave to Russell a memorandum, the terms of which are as follows:

"Gilbert C. Russell has sold and this day absolutely conveyed to James Southard, said Russell's farm near Louisville, and the tract of land belonging to said farm, containing two hundred and sixteen acres, and the possession thereof actually delivered on the following terms, for the sum of \$4929.81½ cents, which has been paid and fully discharged by the said Southard as follows, viz., first two thousand dollars, money of the United States, paid in hand; secondly, the transfer of a certain claim in suit in the Jefferson Circuit Court, Kentucky, in the name of James Southard against Samuel M. Brown and others, now amounting to the sum of \$1558.87½; and thirdly, the transfer of another claim in the same court, in the name of Daniel R. Southard against James C. Johnston and others, now amounting to the sum of \$1270.94, as by reference to the records for the more precise amounts will more fully appear. The said Gilbert C. Russell has taken, and doth hereby agree to receive from said Southard aforesaid, two claims against Brown, &c., and James C. Johnston, &c., as aforesaid, without recourse in any event whatever to the said James Southard, or his assignor, Daniel R. Southard, of the claim of said Johnston, &c., or either, and to take all risk of collection upon himself, and make the best of said claim he can. The said James Southard agrees to resell and convey to the said Russell the said farm and two hundred and sixteen acres of land, for the sum of forty-nine hundred and twenty-nine [dollars] 81½ cents, payable four months after the date hereof, with lawful interest thereon from this date. And the said Russell agrees, and binds himself, his heirs, &c., that if the said sum and interest be not paid to the said James Southard, or his assigns, at the expiration of four months from this date, that then this agreement shall be at an end, and null and void; and the wife of said Russell shall relinquish her dower within a reasonable time as per agreement of this date. This agreement of resale by the said James Southard to the said Russell, is conditional and without a valuable consideration, and entirely dependent on the payment, on or before the expiration of four months from and

after the date hereof, of the said sum of \$4929.81½, and interest thereon from this date as aforesaid. And this agreement is to be valid and obligatory only upon the said James Southard, upon the punctual payment thereof of the sum and interest as aforesaid, by the said Gilbert C. Russell.

"In witness whereof the parties aforesaid, have hereunto set their hands and seals, at Louisville, Kentucky, on this 24th day of September, 1827.

"GILBERT C. RUSSELL, [SEAL.]

"JAMES SOUTHARD, [SEAL.]

"Witness present, signed in duplicate—

J. C. JOHNSTON."

The first question is whether this transaction was a mortgage, or a sale. . . .

The deed and memorandum certainly import a sale; the question is, if their form and terms were not adopted to veil a transaction differing in reality from the appearance it assumed?

In examining this question it is of great importance to inquire whether the consideration was adequate to induce a sale. When no fraud is practised, and no inequitable advantages taken of pressing wants, owners of property do not sell it for a consideration manifestly inadequate, and, therefore, in the cases on this subject great stress is justly laid upon the fact that what is alleged to have been the price bore no proportion to the value of the thing said to have been sold. (*Conway v. Alexander*, 7 Cranch, 241; *Morris v. Nixon*, 1 How. 126; *Vernon v. Bethell*, 2 Eden, 110; *Oldham v. Halley*, 2 J. J. Marsh. 114; *Edrington v. Harper*, 3 J. J. Marsh, 354.)

Upon this important fact the evidence leaves the court in no doubt. The farm, containing 216 acres, was about two miles from Louisville, and abutted on one of the principal highways leading to that city. A dwelling-house, estimated to have cost from \$10,000 to \$12,000, was on the land.

In May, 1826, about 16 months before this alleged sale, Russell purchased the farm of John Floyd, and paid for it the sum of \$12,960. Some attempt is made to show, by the testimony of Mr. Thurston, that this sum was not paid as the value of the land; but what he says upon this point is mere conjecture, deduced by him from hearsay statements, and cannot be allowed to have any weight in a court of justice. There is some conflict in the evidence respecting the state of the fences and the agricultural con-

dition of the lands at the time in question, but we do not find any proof that the lands had been permanently run down, or exhausted; and considering the price paid by Russell, and the amount expended by Wing, his agent, during the sixteen months he managed the farm, we think the evidence shows that, though the fences and buildings were not in the best condition, yet their state was not such as to detract largely from the value of the property. The consideration for the alleged sale was \$2000 in cash, and the assignment of two claims then in suit, amounting, with the interest computed thereon, to \$2829.81, not finally reduced to money by Russell, till October, 1830, upward of three years after the assignment. Making due allowance for the state of the currency in Kentucky at that time, the worst effects of which seem to have been then passing away, and which must be supposed to have affected somewhat the value of the claims he received, as well as of the property he conveyed, we cannot avoid the conclusion that this consideration was grossly inadequate; and therefore we must take along with us, in our investigations, the fact that there was no real proportion between the alleged price and the value of the property said to have been sold. We have not adverted particularly to the opinions of witnesses respecting the value of the property, because they have not great weight with the court, compared with the facts above indicated; but there is a general concurrence of opinion that the value of the farm largely exceeded the alleged price.

It appears that Russell had intrusted the care of this farm to an agent named Wing, who had contracted debts for which Russell had been sued, on coming to Louisville from Alabama, where he resided. He was a stranger, without friends or resources there, except this farm, and in immediate and pressing want of about \$2000 in cash. Southard, though not proved to have been a lender of money at usurious rates of interest, is shown to have been possessed of active capital, and not engaged in any business except its management. Russell certainly attempted to sell the farm. Colonel Woolley testifies,—“Russell was anxious to sell; indeed he was importunate that I should purchase.” And a letter is produced by the defendant, D. R. Southard, written to James Southard, by Wing, containing a proposal for a sale. The letter is as follows:

“Sunday, Noon.

“SIR: Having had some conversation in relation to Colonel Russell's plantation, I will take the liberty of submitting for your consideration, 1st, how much will you give for the place, crops, stock,

utensils, and implements, or how much without the same, to be paid as follows: in one sixth cash in hand, the balance in one, two, three, four, and five equal annual instalments, which may be extinguished at any time with whiskey, pork, bacon, flour, hemp, bale rope, cotton bagging, at the New Orleans prices current, deducting therefrom freight accustomary. Mules and fine horses will now be taken at appraised valuation.

“Respectfully yours,
J. W. WING.

“MR. SOUTHARD.

“N. B.—Please leave an answer for me at Allan’s, say this evening.

Yours, &c.,
J. W. W.”

It does not appear that any price was spoken of between Russell and Colonel Woolley, who peremptorily refused to purchase; nor is any sum of money mentioned in this letter of Wing; but, bearing in mind Russell’s necessity to have \$2000 in cash, the offer to take one-sixth cash, and the balance in one, two, three, four, and five annual instalments, indicates that Russell then expected about \$12,000 for the property, and had that sum in view as the price, when these terms were proposed. This offer to sell differs so widely from the terms of the written memorandum, that it certainly does not aid in showing that the actual transaction was a sale. Peter Wood testifies that he heard a conversation between James Southard and Colonel Russell, about the transfer of the farm from Russell to Southard, in which Mr. Southard proposed to advance money to Russell upon the farm; that Russell told Southard about what he had paid for the farm, \$13,000 or \$14,000, and that he should consider it a sacrifice at \$10,000; but no proposal was made to give, or take, any price for the farm. That some time after, Southard told him he had advanced Russell between \$4000 and \$5000 on the place, but that, in case he owned the place, it would cost him \$10,000. The general character of this witness for truth and veracity is attacked by the defendants, and supported by the plaintiff. His credibility finds support in the consistency of his statements with the prominent facts proved in the case. This is all the proof touching the negotiations which led to the contract; but there is some evidence bearing directly on the real understanding of the parties. Doctor Johnston was the subscribing witness to the written memorandum. He testifies that “James Southard and Gilbert C. Russell, I think on the same day, presented the

agreement, and asked me to witness the same, which I did. My understanding of the contract was both from Southard and Russell, and my distinct impression is, that Russell was to pay the money in four months, and take back the farm." The intelligence and accuracy, as well as the fairness of this witness, are not controverted; and if he is believed, the transaction was a loan of money, upon the security of his farm. It is the opinion of the court that such was the real transaction. The amount and nature of what was advanced, compared with the value of the farm, the testimony of Wood as to the offer of Southard to make an advance of money on the farm, and his subsequent declaration that he had done so, and the information given by both parties to Doctor Johnston, that Russell was to pay the money at the end of four months, present a case of a loan on security, and are not overcome by the answer of Southard and the written memorandum.

It is true, Daniel R. Southard, answering, as he declares, from personal knowledge, sets out, with great minuteness, a case of an absolute and unconditional sale; the written contract by his brother to reconvey being, as he says, a mere gratuity conferred on Russell the next day, or the next but one, after this absolute sale and conveyance had been fully completed. But this account of the transaction is so completely overthrown by the proofs, that it was properly abandoned by the defendants' counsel, as not maintainable. We entertain grave doubts whether, after relying on an absolute sale in his answer, it is open to him to set up in defence a conditional sale; but it cannot be doubted, that the least effect justly attributable to such a departure from the facts, is to deprive his answer of all weight, as evidence, on this part of the case.

In respect to the written memorandum, it was clearly intended to manifest a conditional sale. Very uncommon pains are taken to do this. Indeed, so much anxiety is manifested on this point, as to make it apparent that the draftsman considered he had a somewhat difficult task to perform. But it is not to be forgotten, that the same language which truly describes a real sale, may also be employed to cut off the right of redemption, in case of a loan on security; that it is the duty of the court to watch vigilantly these exercises of skill, lest they should be effectual to accomplish what equity forbids; and that, in doubtful cases, the court leans to the conclusion that the reality was a mortgage, and not a sale. (*Conway v. Alexander*, 7 Cranch, 218; *Flagg v. Mann*, 2 Sumner, 533; *Secrest v. Turner*, 2 J. J. Marsh. 471; *Edrington v. Harper*, 3 J. J. Marsh. 354; *Crane v. Bonnell*, 1 Green, Ch. R. 264; *Robertson v.*

Campbell, 2 Call. 421; *Poindexter v. McCannon*, 1 Dev. Eq. Cas. 373.)

It is true, Russell must have given his assent to this form of the memorandum; but the distress for money under which he then was, places him in the same condition as other borrowers, in numerous cases reported in the books, who have submitted to the dictation of the lender under the pressure of their wants; and a court of equity does not consider a consent, thus obtained, to be sufficient to fix the rights of the parties. "Necessitous men," says the Lord Chancellor, in *Vernon v. Bethell*, 2 Eden, 113, "are not, truly speaking, free men; but, to answer a present emergency, will submit to any terms that the crafty may impose upon them."

The memorandum does not contain any promise by Russell to repay the money, and no personal security was taken; but it is settled that this circumstance does not make the conveyance less effectual as a mortgage. (*Floyer v. Lavington*, 1 P. Wms. 268; *Lawley v. Hooper*, 3 Atk. 278; *Scott v. Fields*, 7 Watts, 360; *Flagg v. Mann*, 2 Sumner, 533; *Ancaster v. Mayer*, 1 Bro. C. C. 454.) And consequently it is not only entirely consistent with the conclusion that a mortgage was intended, but in a case where it was the design of one of the parties to clothe the transaction with the forms of a sale, in order to cut off the right of redemption, it is not to be expected that the party would, by taking personal security, effectually defeat his own attempt to avoid the appearance of a loan.

It has been made a question, indeed, whether the absence of the personal liability of the grantor to repay the money, be a conclusive test to determine whether the conveyance was a mortgage. In *Brown v. Dewey*, 1 Sandf. Ch. R. 57, the cases are reviewed and the result arrived at, that it is not conclusive. It has also been maintained that the proviso, or condition, if not restrained by words showing that the grantor had an option to pay or not, might constitute the grantee a creditor. (*Ancaster v. Mayer*, 1 Bro. C. C. 464; 2 Greenl. Cruise, 82 n, 3.) But we do not think it necessary to determine either of these questions; because we are of opinion that in this case there is sufficient evidence that the relation of debtor and creditor was actually created, and that the written memorandum ascertains the amount of the debt, though it contains no promise to pay it. In such a case it is settled, that an action of assumpsit will lie. (*Tilson v. Warwick Gas-Light Co.*, 4 B. & C. 968; *Yates v. Aston*, 4 Ad. & El. N. S. 182; *Burnett v. Lynch*, 5 B. & C. 589; *Elder v. Rouse*, 15 Wend. 218). . . .

The conclusion at which we have arrived on this part of the case is, that the transaction was, in substance, a loan of money upon the security of the farm, and being so, a court of equity is bound to look through the forms in which the contrivance of the lender has enveloped it, and declare the conveyance of the land to be a mortgage. . . .

A decree is to be entered, reversing the decree of the court below, with costs, declaring that the conveyance from Russell, the complainant, to James Southard, was a mortgage, and that Russell is entitled to redeem the same, and remanding the cause to the Circuit Court, with directions to proceed therein in conformity with the opinion of this court and as the principles of equity shall require.¹

MATTHEWS v. SHEEHAN

COURT OF APPEALS OF NEW YORK, 1877

(69 N. Y. 585)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, affirming a judgment in favor of plaintiff entered upon a verdict.

This action was brought by plaintiff, as administratrix with the will annexed, of Dennis O'Keefe, deceased, to recover moneys alleged to have been collected by defendant upon a policy of insurance issued upon the life of said O'Keefe, and assigned by him to defendant as security for advances made by the latter.

EARL, J. In December, 1869, an arrangement was made between the plaintiff's testator, O'Keefe, and the defendant, whereby O'Keefe was to procure a policy of insurance on his life from the Phoenix Life Insurance Company, and assign it to the defendant, who was to pay the premiums and have the benefit of the policy, with the understanding that if at any time O'Keefe desired to redeem the policy, he could do so by paying the premiums advanced by defendant, with the interest thereon. In pursuance of this arrangement, O'Keefe procured the company to issue a policy on his life, which was immediately assigned to the defendant by an assignment absolute in form, and he paid all the premiums to the

¹ See *Müller v. Thomas*, 14 Ill. 428 (1886); *Reich v. Cochran*, 213 N. Y. (1853); *Bearse v. Ford*, 108 Ill. 16 416 (1914). (1883); *Vos v. Eller*, 109 Ind. 260

time of O'Keefe's death in 1874. Before that time O'Keefe, for the purpose of redeeming the policy, offered to pay the defendant the amount advanced by him for the premiums, and defendant refused to take the money. After the death of O'Keefe, the defendant received from the insurance company the amount insured, and retained the same, refusing, upon plaintiff's demand, to pay any portion thereof to her. This action was brought to recover the sum received by the defendant, less the amount for which he held the policy as security. Upon the trial, the facts above stated appearing, and there being no conflicting evidence, the court directed a verdict for the plaintiff.

The verdict was properly directed. Upon the undisputed evidence, O'Keefe had the option to treat the policy as a security for the premiums paid by the defendant, and to redeem the same. While O'Keefe was not bound to redeem, or personally liable for the money advanced by the defendant, there was sufficient consideration for the arrangement made. O'Keefe submitted to examination, procured his life to be insured, and assigned the policy to the defendant in consideration that the defendant would pay the premiums and give him the option to redeem. The substance and legal effect of the transaction was to make the defendant a mortgagee of the policy to secure him for the premiums paid, and he could not claim an absolute title thereto, except upon O'Keefe's failure to exercise his option to redeem. This was not simply an agreement by the defendant to sell to O'Keefe, upon payment by him of the amount of the premiums advanced with interest, a policy absolutely belonging to the defendant, an agreement void under the statute of frauds, because there was no writing or part payment. It was an agreement that the defendant might take and hold the policy as security and the right to redeem attended the policy into the defendant's hands, and at all times affected his title. Such an agreement may be shown by parol, although the assignment be absolute in form (*Hodges v. The T. M. and Fire Ins. Co.*, 8 N. Y. 416; *Despard v. Walbridge*, 15 N. Y. 374; *Horn v. Keteltas*, 46 N. Y. 605; *Hope v. Balen*, 58 N. Y. 380).

It matters not that O'Keefe did not absolutely promise to pay the amount which defendant should advance for the premiums. To constitute a valid mortgage it is not essential that the mortgagee should have any other remedy but that upon his mortgage. This is recognized by the Revised Statutes in references to real estate mortgages (1 R. S. 739), which provide that when there shall be no express covenant in the mortgage for the payment of

the money received, and no bond or other separate instrument to secure such payment, the remedies of the mortgagee shall be confined to the lands mentioned in the mortgage.¹ In all cases the remedy of the mortgagee may by the agreement of the parties be confined to the mortgage.

It is sometimes difficult to determine whether a transaction constitutes a mortgage or an absolute sale and a conditional resale; and whether it shall be construed to be one or the other depends upon the intention of the parties as evidenced by the instrument executed, and all the circumstances of the case. No general rule upon the subject can be laid down which will govern all cases, although it is said that the fact that there was no debt which could be personally enforced is a strong, but not an absolutely controlling circumstance, that the transaction was not a mortgage, but a sale and a conditional resale. *In all doubtful cases a contract will be construed to be a mortgage rather than a conditional sale,*² because in the case of a mortgage the mortgagor, although he has not strictly complied with the terms of the mortgage, still has his right of redemption; while in the case of a conditional sale, without strict compliance, the rights of the conditional purchaser are forfeited (*Longuet v. Scawen*, 1 Ves. Sen. 402; *Glover v. Payn*, 19 Wend. 578; *Conway's Exrs. v. Alexander*, 7 Cranch, 218; *Edrington v. Harper*, 3 J. J. Marshall, 354; *Floyer v. Lavington*, 1 P. Wms. 268; *Chapman's Admin'x v. Turner*, 1 Colls. R. 280; *Wharf v. Howell*, 5 Binney, 499). In *Floyer v. Lavington*, it is said: "As to the objection that there was no covenant for the payment of the principal or interest, that was not material; the same not being necessary for the making of a mortgage, nor yet necessary that the right should be mutual, viz.: for the mortgagee to compel the payment as well as for the mortgagor to compel a redemption; since such conveyance, as in the present case, though without any covenant or bond for the payment of the money, would yet be plainly a mortgage." In *Brown v. Dewey*, 1 Sandf. Ch. R. 56, it was held that "the absence of the personal liability of the grantor to repay

¹ New York Consol. Laws, Ch. 50, § 249 (Real Prop. L.):—"A mortgage of real property does not imply a covenant for the payment of the sum intended to be secured; and where such covenant is not expressed in the mortgage, or a bond or other separate instrument to secure such payment has not been given, the

remedies of the mortgagee are confined to the property mentioned in the mortgage." And see, *Thomas, Mortgages*, 3d Ed., § 14.

² *Accord, Hughes v. Harlam*, 166 N. Y. 427, 431, 60 N. E. 22 (1901); *Conover v. Palmer*, 123 App. Div. 821, 108 N. Y. Supp. 480 (1908).

the money is not a conclusive test in deciding whether the conveyance is absolute or is intended as a security." In *Holmes v. Grant*, 8 Paige, 243, 257, Denio, V. C., says: "It is not essential that the personal remedy against the mortgagor should be preserved. There is a debt *quoad* the redemption, but not in respect to the personal remedy." In *Flagg v. Mann*, 14 Pick. 467, Putnam, J., says: "There was no collateral undertaking on the part of Luther (the grantor) to pay the money which Walker and Fisher (grantees) should advance in the five years; so there was no mutuality. And this fact, though not conclusive, is to be taken into consideration in ascertaining whether the transaction was a mortgage, or a sale with a contract for a repurchase upon strict terms. (See also *Rice v. Rice*, 4 Pick. 349.) In *Kerr v. Gilmore*, 6 Watts, 405, Kennedy, J., says: "The want of a personal security for the repayment of the money has, taken in connection with other circumstances, been regarded as tending to show that a defeasible purchase and not a mortgage was intended, but this circumstance alone has never been held sufficient to prevent a redemption." Again, "that the mortgagee should have a remedy against the person of the mortgagor also, in order to make the conveyance a mortgage, is more than I can assent to. . . ." In *Horn v. Keteltas*, *supra*, Allen, J., says that the circumstance that there was no agreement to pay the money secured is one entitled to considerable weight in determining whether a conveyance was intended as a mortgage, but that it is only one of the circumstances to be considered, and not conclusive; and Ch. J. Marshall, in *Conway's Exrs. v. Alexander*, 7 Cranch, 218, says: "The want of a covenant to repay the money is not complete evidence that a conditional sale was intended, but is a circumstance of no inconsiderable importance."

It is clear, therefore, both upon principle and authority, that the circumstance that O'Keefe was not personally obligated to pay to the defendant the amount of the premiums which he should advance is not absolutely controlling upon the question, whether there was a mortgage, or a sale and a conditional resale. It is an important circumstance in such cases and, in the conflict of evidence, not unfrequently a controlling one. There are many cases, some of which are cited by the learned counsel for the appellant, in which it has been held to be not as matter of law conclusive, but as matter of fact decisive. If we should hold this to be a case of conditional resale, and that the consequence follows which has been so learnedly argued on behalf of the defendant, that the agreement is void under the statute of frauds, the intention of the

parties would be defeated. This is, therefore, a case where the court should lean to hold the transaction to constitute a mortgage, thus giving what was clearly intended, the right of redemption.

There was nothing said about a repurchase or a resale, or a reassignment, but the right to redeem was expressly stipulated. The language used shows that the parties intended that the policy should be held as security for the premiums paid. Such a construction is at least as admissible as any other, and hence the court did not err in directing a verdict for the plaintiff.

I have treated the transaction as a mortgage, but it is unimportant to determine whether it was a mortgage or a pledge, as the same course of reasoning would apply and the same consequences would follow, whether it was one or the other. The judgment must therefore be affirmed.

All concur.

*Judgment affirmed.*¹

MORTON v. ALLEN

SUPREME COURT OF ALABAMA, 1912

(180 Ala. 279)

BILL by Frank Allen against William Morton to declare a deed absolute on its face a mortgage and to redeem. From a decree for complainant respondent appeals. Affirmed.

DE GRAFFENRIED, J. The bill of complaint in this case was filed by Frank Allen against William Morton for the purpose of having a conveyance which is absolute on its face, and which was made by Frank Allen to William Morton on September 6, 1910, declared to be a mortgage, and to redeem. The deed conveys certain real estate situate at or near Boyles in Jefferson County. It recites a cash consideration of \$6.25 and the assumption by

¹See also, valuable opinion of STORY, J., in *Flagg v. Mann*, 2 Sumn. 486 (1837): "It has been said, that the true test, whether the conveyance in this case was a mortgage or not, is to ascertain whether it was a security for the payment of any money or not. I agree to that; and indeed, in all cases the true test,

whether a mortgage or not, is to ascertain whether the conveyance is a security for the performance or non-performance of any act or thing. If the transaction resolve itself into a security, whatever may be its form, it is in equity a mortgage. If it be not a security then it may be a conditional or an absolute purchase."

the grantee, Morton, of a mortgage indebtedness then existing upon the property of \$905. Frank Allen was residing upon the property, which consisted of something less than three acres, when the conveyance was made, and continued to reside there, occupying it as his home, until this bill was filed.

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The deed is not what, on its face, it purports to be. As a part of the transaction which culminated in the execution of the deed, William Morton executed and delivered to Frank Allen what is termed a "lease sale contract," whereby Morton agreed to lease the property to Allen for a period of 52 months in consideration of \$6.25 in cash paid by said Allen to Morton and the further sum of \$1,029, "divided into fifty-two monthly payments of twenty dollars each for the first fifty-one payments, same being evidenced by fifty-one waive notes payable, the first one October 15, 1910, and each successive month thereafter until December 15, 1914, and one payment of nine dollars due by note January 15, 1915." In this "lease contract" there is a provision that "at the end of the term if the party of the second part (Frank Allen) has complied with each and all the conditions of this lease, then the party of the first part (William Morton) agrees that the rent paid under this lease shall be considered a payment for said property and the party of the first part shall make and execute a deed conveying said property to the party of the second part." There is also in this same "lease contract" a further provision that, if Frank Allen should fail to comply with the terms of the lease contract as to the payment of the "rent" notes as they matured, and should become as much as two months in arrears during the first year of the existence of the lease, or as much as three months in arrears in such payments at any time thereafter, or should fail to pay the taxes on said property as it became due, etc., then all the money paid on the contract should be held as rent for said property, and the right of Frank Allen to a conveyance of the property should be at an end. We therefore have what purports—so far as the face of the deed is concerned—to be an absolute conveyance by Frank Allen of the land to William Morton, but what is not an absolute deed, but a deed, which is either a conditional conveyance or a mortgage to secure a debt.

Frank Allen claims that the deed and lease sale contract was, in reality, a mortgage to secure an indebtedness of \$905 and the interest thereon. William Morton claims that the transaction amounted to a conditional sale of the property, and that it was so understood between him and Frank Allen when the papers were

signed and delivered. If Allen's contention is correct then he is entitled to relief. If not, he is not.

(1) Undoubtedly a court of equity will not undertake to make a contract for parties who are *sui juris*. When two people who possess the legal capacity to contract actually make a contract, if the contract is not tainted with fraud and does not contravene public policy, it is the duty of a court of equity, if its powers are properly invoked for that purpose, to enforce the contract in accordance with its terms. A court of equity has, however, when its jurisdiction is invoked in cases like the present, the power to ascertain what was, in fact, the contract made by the parties, and to determine whether the writings truthfully express the actual agreement which they made.

Oral testimony will be resorted to for that purpose, and, while nothing which rests within the recollection of witnesses can be free from all doubt, the court will, so far as it can do so, get at the truth of the matter, and, having done that, if the court cannot say with reasonable satisfaction that the writings evidence a conditional conveyance of the fee and were not intended as a mortgage, then the court will always *lean* towards the theory that the writings were intended as a mortgage, "as that secures the interests of all parties and works a hardship to none." *Irwin v. Coleman*, 173 Ala. 175, 55 South. 492.

The above rule declared in *Irwin v. Coleman*, *supra*, seems to apply only in cases where the controversy between the parties is whether the true contract as executed by the parties was a *conditional* sale of the lands or a mortgage. This rule does not seem to prevail in cases where the controversy is as to whether the deed was in fact an *unconditional* sale of the land or was only intended as a mortgage to secure a debt.

"To authorize the court to declare a deed *absolute* on its face to be a mortgage, it is not sufficient to raise merely a doubt whether the instrument speaks the intention of the parties. The court must be satisfied by at least a clear preponderance of the evidence that a mortgage was intended and *clearly understood* by the *grantee* as well as by the grantor. This *severe* rule does not apply in cases where the *writings express a conditional sale*, or where it is *admitted* that there was a *contemporaneous agreement* different from that expressed in the instrument." *Reeves v. Abercrombie*, 108 Ala. 535, 19 South. 41.

The above italics are ours, and the rule above declared authorizes this court to weigh the evidence in this case tending to show

that a mortgage was intended by the parties in the light of the fact that, at the time the paper which purported to be an absolute conveyance of the land was executed and delivered, "there was a contemporaneous agreement different from that expressed in the instrument," and which contemporaneous agreement conclusively shows that the instrument was not, in truth, what it purported to be, viz., an absolute conveyance of a fee-simple title to the land. Such a contemporaneous agreement must "have an important bearing in weighing the parol evidence tending to show that the absolute conveyance was intended as a mortgage." *Reeves v. Abercrombie, supra.*

(2) It appears from the evidence that Frank Allen is a man who can write his name, but that he is in fact uneducated. He owned the land in controversy for several years before the transaction which brought about this litigation, and during that period he appears to have built a house on it, and he was living in that house at the time he executed the papers. He seems, first, to have borrowed some money from George Tribble, who is a brother-in-law of William Morton. Tribble, to secure the loan, took from Allen an absolute deed to the land and gave back to Allen a "lease sale contract." In other words, the papers evidencing the loan from Tribble to Allen were similar in all material respects to the papers now under consideration, and those papers, according to Tribble's own testimony, were, in fact, a mortgage. William Morton was on intimate social and business terms with Tribble, seems to have known of these papers, and that they were intended by the parties and were treated by them, as a mortgage. Morton, in fact, seems to have collected some of this indebtedness from Allen for Tribble, and he also appears to have become fully acquainted with Allen's land and to have formed friendly relations with Allen.

Finally Tribble notified Allen that he needed his money. Allen thereupon borrowed from a mortgage company \$905 and paid Tribble all that he owed him. The debt to the mortgage company was evidenced by three notes, one for \$305, due September 4, 1910; one for \$300, due September 4, 1911; and one for \$300, due September 4, 1912—all bearing interest from date at the rate of 8 per cent. per annum. When the first note matured, Allen applied to Morton for a loan with which to pay it. Allen claims that Morton consented to make the loan, and that the papers were executed and delivered to Morton as security for such loan, and that they were intended by both him and Morton to be a mortgage, and only a mortgage. Morton, on the other hand, claims

that he told Allen that he could not and would not lend him the money, that the amount necessary to meet the debt of the mortgage company was too near the actual value of the property for him to make a loan upon it, that he was willing to buy the property from him and then lease it to him at \$20 per month, and that, if he would pay the rent and taxes promptly, then at the expiration of the lease he would deed the property back to him. Morton claims that Allen agreed to this, and that, with a full and complete understanding of the entire transaction, Allen executed and delivered the papers.

There is much dispute among the witnesses as to the value of the land at the time of the above transaction. We are inclined to think that there was an increase in the value of the property after Allen delivered the papers to Morton; but we are convinced that, at the time of the transaction, the property was worth considerable more than \$6.25 in cash and the mortgage for \$905.

We therefore have, in this case, an alleged conditional sale of lands with the following facts existing: (1) The grantor is uneducated. The grantee is uneducated. The grantor appears to have had but little to do with the business world. The grantee appears to be a member of it. The grantor regards the grantee as his friend. The grantor had previously had a similar transaction with the brother-in-law of the grantee, and that transaction involved a loan, a fact known by the grantee. The papers now under consideration were prepared under the supervision of the grantee, and said papers are, in effect, duplicates of the papers which secured the above loan made by the brother-in-law. (2) The lands were worth considerably more than the consideration expressed in the conveyance and were in a section in which, according to all the testimony, the value of land was constantly increasing. (3) The transaction was the culmination of what was, admittedly, at first, a mere negotiation for a loan, and the loan was applied for because of the friendly relations existing between the parties. (4) For a recited cash consideration of \$6.25 and the assumption of a debt which was still, as between the grantor and the mortgage company, binding on the grantor, the grantee becomes the owner of what on the face of the conveyance appears to be the fee-simple title to the land, but which conveyance was not, according to the admitted facts, intended to operate as an unconditional conveyance of the fee. (5) The grantor remains in possession of the land, assesses it for taxes, and continues to exercise the same rights over it which he had previously done. (6) The grantor testifies that the papers

were intended by both parties as a mortgage, and the grantee testifies that they were not so intended. (7) The "lease sale contract" provides for the payment by the grantor to the grantee of \$1,035, a sum sufficient to meet the \$905 mortgage held by the mortgage company on the property and the interest thereon.

The above being the situation, it is our duty—under the rule that a court of equity, in a contest over the question as to whether a given transaction constituted a conditional sale of land or a mortgage, to lean to the theory that the transaction was a mortgage—to declare that the deed was intended to be, and was in fact, a mortgage. *Crews v. Threadgill*, 35 Ala. 334, 3 Pom. Eq. (3d Ed.), § 1195; *Rose v. Gandy*, 137 Ala. 330, 34 South. 239; *Abercrombie v. Reeves*, 108 Ala. 535, 19 South. 41; *Irwin v. Coleman*, *supra*; 1 Jones on Mortgages, § 328.

The above being our opinion, the decree of the court below is affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ., concur.¹

SHELDON v. McFEE

COURT OF APPEALS OF NEW YORK, 1916

(216 N. Y. 618)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 28, 1914, affirming a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

CHASE, J. This is an action to recover damages for the conversion of a safe. In April, 1910, one Fleming, then the owner of the safe and certain other office furniture, in the city of Oneonta, and as a part of a transaction which included the transfer of his interest in a real estate and insurance business and said safe and office furniture to his partner, White, executed and delivered to the

¹ The authorities on the general subject are collected in an exhaustive note in L. R. A. 1916, B, page 18 *et seq.*

plaintiff an instrument in the form of a bill of sale which purported, for the express consideration of one dollar and other valuable considerations, to transfer to the plaintiff the safe and office furniture. As a part of the transaction said White executed a similar instrument to the plaintiff for the expressed consideration of \$400 by which she transferred to the plaintiff certain household furniture. As a part of the transaction White borrowed of the plaintiff \$700 and gave to him a series of promissory notes dated April 15, 1910, on most of which was indorsed "Bill of Sale, dated April 15, 1910, on household goods and office furniture to secure payment of within note." The bills of sale were in fact given as collateral security for the payment of said notes and each of them. On April 29 the bill of sale from Fleming to plaintiff was by the plaintiff filed in the office of the clerk of the city of Oneonta, in which city the parties resided. Some time thereafter White exchanged the safe in question for another safe, and the purchaser of the safe in question on the exchange of property sold the same to a person who subsequently sold such safe to the defendants in this action who have the possession thereof. There is default in the payment of a part of the amount of said loan. Before this action was commenced the plaintiff demanded the possession of said safe from the defendants and it was refused.

All of the questions of fact affecting the issues have been passed upon by a jury adversely to the defendants, and there is some evidence on which to base the findings of the jury upon each of the questions submitted to it. There is a question of law presented for our consideration, and that question is whether when a bill of sale absolute on its face, but in fact intended to operate as a mortgage of goods and chattels is filed pursuant to the provisions of article 10 of the Lien Law, it is notice to a subsequent purchaser in good faith, although there is nothing in the instrument itself expressing such intention and there is not filed therewith any other or further paper showing that the sale was intended to operate as a mortgage of goods and chattels.

We think the question is answered by the express language of the statute. It is provided by section 230 of the Lien Law (Cons. Laws, ch. 33) that "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels . . . which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, is absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless

the mortgage, or a true copy thereof, is filed as directed in this article."

The city clerk of the city of Oneonta placed the instrument in question on file and indorsed thereon the time of its receipt, and the record book kept in the office of said clerk shows that it was so filed April 29, 1910, 4 P. M. Within thirty days next preceding the expiration of one year from the time of filing the same the plaintiff filed a renewal of the instrument, describing it and calling it a chattel mortgage, and asserting in such renewal that there remained unpaid of the amount secured by said mortgage the sum of \$400 and interest thereon from a day specified.

The statutes do not provide for filing an instrument intended as an absolute transfer of personal property, but require in immediate delivery of the property followed by actual and continued change of possession to avoid a presumption of fraud. (Personal Property Law [Cons. Laws, ch. 41], § 36.) The intention of the statute first quoted is clear, and a reference to some of the decisions of our courts will show that a conveyance intended to operate as a mortgage of goods and chattels has at all times been treated under that statute the same as a chattel mortgage.

The right to redeem is the essential characteristic of a mortgage, and a bill of sale of chattels with a separate defeasance is as clearly a mortgage as if the defeasance formed a part of the bill of sale. (*Mooney v. Byrne*, 163 N. Y. 86, 92; *Brown v. Bement*, 8 Johns. 96; *Jones on Chattel Mortgages*, § 19.) An agreement to sell the same property, for the same price, made at the same time, and between the same parties, is a defeasance. (*Dickinson v. Oliver*, 195 N. Y. 238, 246.)

A bill of sale absolute on its face transferring property to be held as security for the payment of a debt due the vendee is in character and effect a mortgage and is to be treated as such. (*Smith v. Beattie*, 31 N. Y. 542; *Woodworth v. Hodgson*, 56 Hun, 236; *Kings County Bank v. Courtney*, 69 Hun, 152; *Susman v. Whyard*, 149 N. Y. 127; *Dickinson v. Oliver*, 96 App. Div. 65; S. C., 195 N. Y. 238, affirming 127 App. Div. 932; *Sloan v. National Surety Co.*, 74 App. Div. 417.) And this is true, not only as between the parties to the transaction, but also as to third parties who are affected with notice. (5 Ruling Case Law, 388.) It may be shown by parol. (*Despard v. Walbridge*, 15 N. Y. 374; *Horn v. Keteltas*, 46 N. Y. 605; *Barry v. Colville*, 129 N. Y. 302.) The intention may be manifested by the instrument itself, or by a written instrument of defeasance executed simultaneously with the con-

veyance or by the parol declaration or even the acts of the parties. (Clark v. Henry, 2 Cow. 324.)

Where a bill of sale absolute upon its face is in fact given as security for the payment of a debt due the vendee it must be filed in accordance with the statute. (Lien Law, § 230; Woodworth v. Hodgson, *supra*; Preston v. Southwick, 115 N. Y. 139; Kings County Bank v. Courtney, *supra*; Sloan v. National Surety Co., *supra*.)

In the Preston case, referring to certain bills of sale therein described, the court say: "If they be considered as absolute bills of sale, they were not required to be filed, as it is only 'mortgages or conveyances intended to operate as mortgages of goods,' etc., that are referred to in the statute requiring filing (§ 1, chap. 279, Laws of 1833). If we regard them as conveyances, intended to operate as mortgages, then they were properly filed in accordance with the statute" (p. 148).

It was therein claimed by the appellant that the evidence shows that the transfers were intended to operate as mortgages only and that because this intent did not appear in the instruments filed the filing did not satisfy the requirements of the statute. It appeared that a subsequent paper was executed which it was claimed by appellant was a defeasance. The court say: "There was no necessity for or propriety in the filing of this paper with the bills of sale. The instruments required to be filed are: *First*. Mortgages; that is, instruments having the form and character of mortgages. *Second*. Conveyances intended to operate as mortgages. It is quite immaterial how this intention is expressed, whether in writing or by parol. However, it exists, the requirement of the statute is that the conveyance shall be filed. It is quite obvious that the statute did not intend to require the filing of an intention, as that would be physically impossible if resting in parol alone. The existence of a parol agreement between parties that a conveyance shall be regarded as a security for a debt, undoubtedly invests it in many respects with the characteristics of a mortgage; but, strictly speaking, it does not make it a mortgage. It must, then, be filed as a conveyance or bill of sale, and the extrinsic agreement forms no part of the instrument required to be filed" (p. 149).

At the time of the commencement of this action the legal title to the safe was vested in the plaintiff, and he could maintain the action. (Bragelman v. Daue, 69 N. Y. 69.)

It must have been found as a fact by the jury that the bill of sale in question was intended to operate as a mortgage of goods and chattels, and that it was properly filed in the city clerk's

\\ office. By the terms of the statute such filing was constructive notice to the defendants of the plaintiff's claim.

The judgment should be affirmed, with costs.

WILLARD BARTLETT, Ch. J., COLLIN, CUDDEBACK, HOGAN, CARDOZO and POUND, JJ., concur.

Judgment affirmed.

CHAPTER II. (*Continued*)

SECTION II.—ABSOLUTE DEED—PAROL EVIDENCE

COTTERELL *v.* PURCHASE

COURT OF CHANCERY, 1734

(*Cas. temp. Talb.* 61)

THE plaintiff and her sister being seised of an estate in Yorkshire as joint tenants, the plaintiff by lease and release, in consideration of 104*l.* conveys the moiety to the defendant and his heirs: but it was admitted, that the conveyance (though absolute in law) was intended by the parties as a mortgage, to be redeemable on payment of the money with interest. Some time after, in the year 1708, those deeds were cancelled; and in consideration of a farther sum, which made up the whole 184*l.* she conveys the estate in manner as before, but with this farther covenant, That she would not agree to any division or partition of the estate, or make, or cause to be made, any division or partition thereof, without the license, consent, advice and appointment of him the said Benjamin Purchase. At the time of this conveyance the plaintiff's sister was in possession of the whole estate, and so continued till the year 1710, when the defendant turned her out of possession of the moiety by ejectment; and from that time he enjoyed it quietly till 1726, at which time the plaintiff filed her bill to [be] let into redemption; to which the defendant pleaded himself an absolute purchaser for a valuable consideration; and in 1732, the cause coming to be heard upon the merits, the *Master of the Rolls* was of opinion, that the deeds of 1708, amounted to an absolute conveyance; and dismissed the bill.

For the defendant were given in evidence several particulars to shew that by the deeds of 1708, the parties intended an absolute conveyance of this estate. And it was insisted that as the deeds were an absolute conveyance in law, by the statute of frauds no trust or mortgage could be implied without an agreement in writing. And they insisted likewise, that as the defendant had been

in possession ever since the year 1710, the plaintiff was barred of the redemption by the statute of limitations.

It was said on the other hand for the plaintiff, That the defendant's plea admitted the first conveyance made in consideration of the 104*l.* to be intended but as a mortgage; and that the second conveyance was in the same form, excepting the covenant; and that it was therefore probably intended in the same manner. That as to the covenant, it made strongly for the plaintiff; since to suppose a person would absolutely sell away his estate, and then covenant not to make a division of it, is absurd. That the statute of frauds makes nothing against the plaintiff; this being in nature of a resulting trust, and so within the proviso in that statute. Nor can the statute of limitations affect the plaintiff; since in cases of redemptions the court always gives what it thinks a reasonable time. And though the general rule be not to exceed twenty years, unless it be upon extraordinary circumstances; yet that rule cannot affect the plaintiff, who did not lose possession till 1710, and brought her bill in 1726.

LORD CHANCELLOR [TALBOT]. The case is something dark. The first deed is admitted to be a mortgage; and the second is made in the same manner, excepting an odd sort of covenant, which is the darkest part of the case: for, to suppose that it is an absolute conveyance, and to take a covenant from one who had nothing to do with the estate, makes both the parties and covenants vain and ridiculous. But then it will be equally vain and ridiculous if you suppose the deed not an absolute conveyance; so that it is of no great weight, and must be laid out of the question. Then as to the circumstances; on one side has been shewed an account stated of money received; and it is there said *so much received on account of purchase money*, and in another general account the sum of 184*l.* is called *purchase money*. Then as to the agreement in 1710, that if the plaintiff had a desire for it, she should have her estate again upon payment of the money with interest, and the costs he had been at: this shews it was not redeemable at first. There have been strong proofs on both sides as to the value: one has shewn the rent to be but 27*l. per ann.* and then deducting one-third out of it for the dower of the plaintiff's mother, a moiety of what remains is near the value of the money paid. The other side has shewn the rent to be 40*l. per ann.* But I rather give credit to the first; because it is certain the dower was but 9*l. per ann.* So that, upon the whole, I am inclined to think this was at first an absolute conveyance.

Had the plaintiff continued in possession any time after the execution of the deeds, I should have been clear that it was a mortgage; but she was not. And her long acquiescence under the defendant's possession is, to me, a strong evidence that it was to be an absolute conveyance; otherwise, the length of time would not have signified: for, they who take a conveyance of an estate as a mortgage, without any defeazance, are guilty of a fraud; and no length of time will bar a fraud. Besides, here the bill was filed in 1726. And though the cause has lain dormant; yet it is not like making an entry and then lying still; for, in the present case, the defendant might have dismissed the bill for want of prosecution, or they themselves might have set down the plea to be argued.

In the Northern parts it is the custom in drawing mortgages to make an absolute deed, with a defeazance separate from it; but I think it a wrong way; and, to me, it will always appear with a face of fraud: for, the defeazance may be lost; and then an absolute conveyance is set up. I would discourage the practice as much as possible.¹

Upon the circumstances of the case, affirmed the decree, &c.

KELLERAN v. BROWN

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1806

(4 *Mass.* 443)

THIS was a writ of entry, and upon the general issue pleaded was tried before Thatcher, J., September term, 1806, when a verdict was rendered for the defendant.

In support of the action, the demandant read in evidence a deed of Timothy Manly conveying the land demanded to the demandant in fee.

The tenant, in defence of the action, having prayed in aid the title of Timothy Manly, under whom he claims the premises as

¹ "So where an absolute conveyance is made for such a sum of money, and the person to whom it was made, instead of entering and receiving the profits, demands interest for his money and has it paid him, this will be admitted to explain the nature of the conveyance."—*Per* LORD CH. NOTTINGHAM, in *Maxwell v. Lady*

Mountacute, Finch, Pre. Ch. 526 (1719).

"Suppose a person who advances money should, after he has executed the absolute conveyance, refuse to execute the defeazance, will not this court relieve against such fraud?"—*Per* LORD CH. HARDWICKE, in *Walker v. Walker*, 2 Atk. 98 (1740).

his tenant, the counsel for the tenant, to show the demandant ought not to have judgment, except as in an action upon a mortgage, offered to read in evidence an agreement in writing signed by the demandant, and bearing even date with the deed aforesaid, in the following terms, viz.: "Thomaston, May 26, 1800. I, Edward Kelloran, the subscriber, having purchased of Timothy Manly a lot of land lying in said Thomaston, containing fifty acres (being the lot which the said Manly purchased of Ebenezer Bly) for which I have received a warranty deed; but if the said Manly shall repay me the sum of four hundred dollars, with the lawful interest on the same in one year from the date hereof, I then will reconvey the said lot of land to him. Edward Kelloran;" and also offered to prove to the jury that the tenant, Brown, at the time of the commencement of this action, and for a long time before, was, and ever since has been, tenant at will of the premises demanded, under the said Timothy Manly, the aid of whose title is prayed in this action.

The demandant's counsel objecting, the judge rejected said agreement and evidence, as inadmissible. To which opinion of the judge the counsel for the tenant excepted, as erroneous; whereupon the cause stood continued for the opinion of the Court upon the said exceptions.

At last June term in this county, the cause was briefly spoken to by *Mellen* in support of the exceptions, and thence continued for advisement, and now the opinion of the Court was delivered by

PARSONS, C. J. The demandant has sued a writ of entry, to recover his seisin of the lands demanded in his writ and count. The tenant pleads the general issue, and to maintain the issue on his part, offers to give in evidence that he is the tenant at will to one Timothy Manly; and that Manly conveyed the lands demanded to Kelloran in mortgage. To prove that the conveyance was a mortgage, he offered to read in evidence a contract in writing, under the demandant's hand, of the following tenor: (Here his honor read the agreement before recited.) But the judge rejected the evidence that he was tenant at will, and refused to let this contract be read to the jury.

As the demandant, in his writ, had demanded a freehold of the tenant, he, by pleading the general issue, had admitted on record that he was the tenant of the freehold. He was, therefore, estopped from proving that he had not the freehold but was a tenant at will.

As to the effect of the written contract, if it be an instrument of defeasance at common law of the conveyance made by Manly to the demandant, the tenant might have read it in evidence to show that the demandant was entitled only to the conditional judgment, as in a suit to foreclose a mortgage.

In chancery, whenever it appears, from written evidence, that land is conveyed as a pledge to secure the payment of money, the conveyance will be treated as a mortgage, in whatever form the land was pledged, and if we had all the equity powers of a Court of Chancery, I should be satisfied that the conveyance in this case, with the written contract of defeasance, would be deemed in equity a mortgage, and the grantee would be allowed to redeem.

But the equity powers of this Court are derived from statute, and are extremely limited. We can relieve mortgagors only in cases where the lands are granted on condition, by force of any deed of mortgage, or bargain and sale with defeasance. (*Vide Statutes 1785, c. 22; 1798, c. 77.*) Now a defeasance of any instrument of conveyance must be of as high a nature as the conveyance, must be executed at the same time, and is to be considered as part of it; so that the conveyance and defeasance must be taken together and considered as parts of one contract. If, therefore, the conveyance is by deed, the defeasance must be by deed. In this case the conveyance by Manly to Kelleran was by deed, and the agreement by Kelleran was merely by a simple contract; and, however it might in equity have the effect of a defeasance, at law it is not a defeasance of the deed of Kelleran.

The counsel for the tenant referred to the statute of 1802, c. 33, which provides that no conveyance of any land, unless for a term less than seven years, shall be defeated or incumbered by any bond or other deed, or instrument of defeasance, unless they are registered. This provision cannot avail to enlarge our jurisdiction, which was not within the purview of the act. What shall be deemed an instrument of defeasance must still be determined upon the principles of the common law. The written contract to Kelleran not under his seal was, in our opinion, properly rejected as evidence.

Judgment according to the verdict.

¹ *An Act giving Remedies in Equity*, § 1; Gen. Stats., c. 113, § 2, and see Perpetual Laws of Mass., p. 138. page 190, *post*. Compare Mass. Stat. 1855, c. 194,

STRONG v. STEWART

COURT OF CHANCERY OF NEW YORK, 1819

(4 Johns. Ch. 167)

BILL to redeem mortgaged premises. The defendant set up an absolute sale, by an assignment, absolute in terms, of the right of Mitchell in the land, and denied the fact of a loan. But the defendant, at the same time, admitted in his answer, that after the assignment was executed he gave Mitchell, at his request, time to return the money, and take back the assignment.

Parol proof was taken, which established conclusively the fact of a loan, and not a purchase and sale; and that the assignment was made, given and received, by way of security for a loan.

THE CHANCELLOR [KENT]. On the strength of the authorities, and on the proof of the loan, and of the fraud, on the part of the defendant, in attempting to convert a mortgage into an absolute sale, I shall decree an existing right in the plaintiffs to redeem. The cases of *Cotterell v. Purchase*, Cases temp. Talbot, 61; *Maxwell v. Mountacute*, Prec. in Chancery, 526; *Washburn v. Merrills*, 1 Day's Cases in Error, 139, and the acknowledged doctrine, in 2 Atk. 99, 258, 3 Atk. 389, and 1 Powell on Mortg. 104 (4th London edit.) are sufficient to show, that parol evidence is admissible in such cases, to prove that a mortgage was intended, and not an absolute sale, and that the party had fraudulently perverted the loan into a sale. In this case, the admissions in the answer were sufficient to presume a mortgage, against the absolute terms of the assignment.¹

Decree accordingly.

¹ "Courts of equity generally exercise such power. While the grounds upon which the doctrine is admitted vary with different courts, there is a great concurrence of opinion as far as the result is concerned. In our judgment, it is a sound policy as well as principle to declare that, to take an absolute conveyance as a mortgage without any defeasance, is in equity a fraud. Experience shows that endless frauds and oppressions

would be perpetrated under such modes, if equity could not grant relief. It is taking an agreement, in one sense, exceeding and differing from the true agreement. Instead of setting it wholly aside, equity is worked out by adapting it to the purpose originally intended. Equity allows reparation to be made by admitting a verbal defeasance to be proved."—Per PETERS, J., in *Stinchfield v. Milliken*, 71 Me. 567 (1880).

TOWN OF READING v. WESTON

SUPREME COURT OF ERRORS OF CONNECTICUT, 1830

(8 *Conn.* 117)

THIS was an action of assumpsit for the support of the wife and minor children of Samuel Darling.

The cause was tried (after two former trials),¹ at Fairfield, December term, 1829, before Williams, J.

The paupers derived their settlement from Lucy Darling, the mother of Samuel Darling. She was once an inhabitant of the town of Weston. The defendants claimed, that in March, 1808, she became the owner of a piece of land in the town of Reading, of the value of 800 dollars, by virtue of a deed from one Joseph Burr. This deed was, on the face of it, an absolute deed, in the usual form, containing the usual covenants. A writing (recited at length, 7 *Conn. Rep.* 144) was made and signed by her, and delivered to Burr, simultaneously with the delivery of the deed, binding herself, if Burr should within three years bring her the 800 dollars, with interest, to deliver up to him such deed, but if he should fail to bring the money by the time limited, he should forfeit all claim to such deed. The defendants claimed that immediately after the execution of the deed, Lucy Darling, the grantee, went into possession of the land thereby conveyed, and possessed it in her own right in fee until the year 1813. It was admitted that she occupied part of the house and garden, belonging to the premises; and that Burr occupied the remaining part, during the period specified. Evidence was introduced as to the character of their respective possessions, or the right in which they occupied the premises; the plaintiffs claiming that Lucy Darling occupied as mortgagee under Burr and not in her own right. In support of this claim the plaintiffs introduced proof of her declaration that she had only a mortgage of the premises, and other parol evidence to shew that the deed and writing were given only to secure a sum of money, which Burr at that time borrowed of her, and for which he gave her his notes. This evidence was objected to by the defendants, but was received subject to the opinion of the court. And the court charged the jury that such evidence was proper to shew the nature, character and extent of her occupation; but that in

¹ See 7 *Conn. Rep.* 143, 400.—*Rep.*

this suit parol evidence could not be admitted to alter, enlarge or explain the deed or condition, or to shew that this conveyance was a mortgage.

The jury returned a verdict for the defendants; and the plaintiffs moved for a new trial, for a misdirection.

HOSMER, Ch. J. The only question in the case is, whether the parol evidence offered by the plaintiff, to control or vary the absolute deed, was admissible.

On a former occasion between the present parties, it was decided by this Court that the writing in question was only a contract, on certain terms, to re-convey the land; and that it did not render the deed a mortgage (*Reading v. Weston*, 7 Conn. Rep. 143). In the case before us, the parol evidence adduced by the plaintiffs to prove an absolute deed to be a deed on condition, was entirely inadmissible. No case determined in a court of law proving its admissibility, has been cited; nor am I aware that any such case exists. On the contrary, in *Flint v. Sheldon*, 13 Mass. Rep. 443, it was adjudged that an absolute deed of land cannot be varied by parol evidence shewing that it was for the loan and re-payment of a sum of money. This determination is directly in point for the defendants. It has been so frequently adjudged by the courts on both sides of the Atlantic, as to have the resistless force of a maxim, that parol evidence cannot be received, in a court of law, to contradict, vary, or materially affect, by way of explanation, a written contract (*Skinner & al. v. Hendrick*, 1 Root, 253; *Stackpole v. Arnold*, 11 Mass. Rep. 27; *Jackson d. Van Vechten & al. v. Sill & al.*, 11 Johns. Rep. 201; 3 Stark. Ev. 1002; 1 Phill. Ev. 423, 441). It is not in opposition to this legal truth, that extrinsic parol evidence, when requisite, is admissible to apply the terms of a written instrument to a particular subject-matter, but in perfect consistency with it. This is not to vary or contradict, but to give its intended effect to the contract.

Undoubtedly there have been determinations, some of which have been cited, proving that a stranger is not estopped by a written agreement; but that he may adduce parol testimony to prevent a fraudulent operation of it upon his interests (*The King v. Scammonden*, 3 Term. Rep. 474; *New Berlin v. Norwich*, 10 Johns. Rep. 229; 3 Stark. Ev. 1018, 1052). But this principle has no application to the present case. The plaintiffs have not suggested that there was any fraud contemplated and practised on them. The pretence would have been very strange unless it were followed

up by explicit testimony to this effect. The inhabitancy of Lucy Darling, *prima facie*, with property sufficient to purchase a farm of the value of 800 dollars, was a benefit to the plaintiffs, and not a prejudice; and all our towns would be pleased in this manner to extend their population.

It will be observed that the question before us is not what a court of chancery may do, in the exercise of its peculiar jurisdiction, but what is the established rule of a court of law. It has been often decided in chancery that parol evidence is admissible to shew that an absolute deed was intended as a mortgage, and that a defeasance was omitted through fraud or mistake. Hence, a deed absolute on the face of it, and though registered as a deed, will in chancery be held valid and effectual as a mortgage, as between the parties, if it was intended by them to be merely a security for a debt, although the defeasance was by an agreement resting in parol (*Washburn v. Merrills*, 1 Day, 139, 1 Pow. Mort. 200; *Strong & al. v. Stewart*, 4 Johns. Chan. Rep. 167; *James v. Johnston & al.*, 6 Johns. Chan. Rep. 417; *Maxwell v. Lady Mountacute*, Prec. in Chan. 526; *Dixon v. Parker*, 2 Ves. 225; *Marks & al. v. Pell*, 1 Johns. Chan. Rep. 594; *Clark v. Henry*, 2 Cowen, 324; *Slee v. Manhattan Company*, 1 Paige, 48). But these decisions are altogether in support of the determination of the judge in this case. Chancery interposes because a court of law does not afford a remedy. The rule in the courts of law is that the written instrument, in contemplation of law, contains the true agreement of the parties, and that the writing furnishes better evidence of their intention than any that can be supplied by parol. But in equity, relief may be had against any deed or contract in writing founded in mistake or fraud (1 Madd. Chan. 41; *Moses v. Murgatroyd*, 1 Johns. Chan. Rep. 128; *Marks & al. v. Pell*, 1 Johns. Chan. Rep. 594; *Gillespie & ux. v. Moon*, 2 Johns. Chan. Rep. 585; *Noble v. Comstock*, 3 Conn. Rep. 295).

On the whole, it is incontrovertibly clear that the decision complained of is correct, and that a new trial must be denied.

Peters, Williams and Bissell, JJ., were of the same opinion.

Daggett, J., having been of counsel in the cause, gave no opinion.

*New trial not to be granted.*¹

¹ *McClane v. White*, 5 Minn. 178 (1861); *Gates v. Sutherland*, 76 Mich. 231 (1889), *accord*.

SWART *v.* SERVICE

SUPREME COURT OF NEW YORK, 1839

(21 *Wend.* 36)

THIS was an action of ejectment, tried at the Saratoga circuit in May, 1837, before the Hon. John Willard, one of the circuit judges.

The plaintiffs, the children of James Swart, deceased, who was the only child and heir at law of Derick Swart, showed title by *lease and release*, bearing date 24th and 25th September, 1784, executed by John Cuerdon to Derick Swart, conveying 68 acres of land, the premises in question: which instruments of lease and release were duly acknowledged by Cuerdon on the *sixth* day of *April*, 1804. Cuerdon, the releasor of the premises, died in possession of the premises eight or nine years before the trial, having occupied them since the date of the lease and release. The defendant was in possession of the premises at the commencement of the suit. He offered to prove that the *lease and release* was in fact given as a *mortgage* for the security of a debt due from Cuerdon to Swart, and that the debt was paid by Cuerdon to Swart many years before his death: this evidence was objected to, unless the defendant would connect himself with Cuerdon, and the objection was sustained by the circuit judge. The defendant then requested the judge to charge that the evidence established an *adverse possession* in Cuerdon. The judge refused so to charge, and directed a verdict for the plaintiffs, and the jury found accordingly. The defendant now moved for a new trial on the two grounds raised at the circuit, and on the additional ground, that from lapse of time, *payment* of the mortgage might be presumed. . . .

By the Court: COWEN, J. The first offer made by the defendant had no dependence on privity of title between him and Cuerdon. It was a simple offer to prove an outstanding title, by turning the conveyance by lease and release into a mortgage, and shewing its extinction by payment. That would divest the title of Swart and of his grandchildren, the plaintiffs; for payment extinguishes a mortgage at law as well as in equity (*Jackson, ex dem. Rosevelt, v. Stackhouse*, 1 Cowen, 122). But independent of that, if Swart were a mere mortgagee, neither he nor those claiming under him could recover (2 R. S. 237, § 37, 2d ed., *Jackson, ex dem. Titus, v. Myers*,

11 Wendell, 533, 538, 539; *Stewart v. Hutchins*, 13 Wendell, 485; *Morris v. Mowatt*, 2 Paige, 586).

It has often been held in the courts of equity of this State, that a deed, though absolute on its face, may, by parol evidence, be shown to have been in fact a mortgage, in the terms offered here; and the same doctrine was held by this court in *Roach v. Cosine*, 9 Wendell, 227, and *Walton v. Cronley's Adm'r*, 14 *id.* 63, equally applicable to a court of law, and has it seems ceased to be the subject of contest; for no objection to the doctrine is now made. For one, I was always at a loss to see on what principle the doctrine could be rested, either at law or in equity, unless fraud or mistake were shown in obtaining an absolute deed where it should have been a mortgage.¹ In either case, the deed might be rectified in equity; and perhaps even at law, in this State, where mortgages stand much on the same footing in both courts. Short of that, the evidence is a direct contradiction of the deed; and I am not aware that it has ever been allowed in any other courts of equity or law. But with us the doctrine is settled, and I am not disposed to examine its foundations, at least, without the advantage of discussion.

It is not necessary to say whether the lapse of time might be called in as presumptive proof of payment, though that, as a general doctrine, is too clear to be disputed. If the defendant, on a new trial, shall succeed in making out a mortgage, he will be entitled to such proofs of payment as the nature of his case may afford, subject to the answering proofs of the plaintiffs, provided proof of payment shall become necessary.

It will not, however, be necessary that we see, to complete his defense here, whatever it may be on a bill filed to foreclose by the representatives of Derick Swart; for since the revised statutes, showing that the plaintiffs or those under whom they claim are mere mortgagees, proves as we have seen, an outstanding title.

There was no evidence of adverse possession in Cuerdon. I am of opinion that a new trial should be granted; the costs to abide the event.

THE CHIEF JUSTICE [NELSON] concurred.²

MR. JUSTICE BRONSON delivered the following dissenting opinion:

Although I seldom allow myself to depart from the decisions of

¹ This language was approved by BURNETT, J., in *Lee v. Evans*, 8 Cal. 424 (1857). But see *Pierce v. Robin-*

son, 13 Cal. 116 (1859), refusing so to limit the doctrine.

² *Contra*, *Webb v. Rice*, 6 Hill (N. Y. Court of Errors), 219 (1843).

those who have gone before me in this court, I cannot agree with my brethren in following one or two recent cases which hold that an absolute deed can be turned into a mortgage in a court of law, by parol evidence. Where the transaction was intended as a mortgage, and through fraud or mistake the conveyance has been made absolute in its terms, a court of equity, acting upon well-established principles, can reform the deed. But this will only be done on a direct and appropriate proceedings for that purpose, and after such ample notice to all parties in interest, as will tend most effectually to guard against surprise, fraud and false swearing. And besides, a court of equity can and will protect third persons who may have parted with their money on the faith of the deed. But a court of law has neither power nor process to reform a deed. If parol evidence to contradict or insert a condition in the conveyance can be received at all, it must of necessity be in a collateral proceeding; and it must be received whenever either party chooses to offer it. It can be given without notice, and without the means of guarding against the obvious danger of fraud, surprise and perjury. And beyond this: when a court of law turns an absolute deed into a mortgage, it has no power to protect a *bona fide* purchaser. Other mischiefs will be likely to result from admitting such evidence; but without attempting at this time to point them out, I shall content myself with dissenting from what I deem a new and very dangerous doctrine.

HODGES v. TENNESSEE MARINE AND FIRE INSURANCE CO.

COURT OF APPEALS OF NEW YORK, 1853

(8 N. Y. 416)

THIS was an action brought in the Superior Court of the city of New York upon a policy of insurance upon a hotel in Massachusetts, issued by the defendant to Joseph A. Slamm on the first of September, 1848. On the same day Slamm conveyed the premises to the plaintiff by a deed absolute on its face. On the 4th of the same month Slamm with the assent of the company assigned the policy to the plaintiff "as a collateral security." The property insured was burned in the month of April, 1849.

In the complaint the plaintiff alleged that Slamm had conveyed the insured premises to him by deed, "and that prior to and at the

time of the conveyance the said Slamm had been and was legally indebted to him, and as a further security, simultaneously with the conveyance" assigned the policy to him as a collateral security. The defendant in the answer denied the plaintiff's right to recover, on the ground that the assignment was approved on the representation that it was intended as a collateral security upon an indebtedness secured by a mortgage, when in fact the insured premises had been conveyed absolutely to the plaintiff, by means whereof the policy became void. The plaintiff replied, denying that any representation that the indebtedness was secured by a mortgage was made, or that the approval of the defendant was made on the faith of such a representation, and averring that at the time of approving the assignment the defendant was informed of the deed.

On the trial the plaintiff, after giving in evidence the policy and assignment and proving the loss, rested. The defendant's counsel then moved for a nonsuit, which was denied. The deed from Slamm to the plaintiff was then given in evidence, and it was proved by witnesses in the defendant's office that at the time the approval of the assignment was made, it was understood to be collateral and to cover some mortgage, and that the blank for the assignment was there filled up at the request of the plaintiff. The defendant then rested. The plaintiff then called a witness to show that the deed was given merely as a security for money due to him from Slamm. The defendant's counsel objected, on the ground that the plaintiff's pleadings alleged the deed to be an absolute conveyance, and the court sustained the objection. The plaintiff's counsel then moved to amend the complaint by adding an averment that the conveyance of the insured premises was made as a collateral security for an indebtedness of Slamm to the plaintiff. The defendant opposed the amendment, on the ground that proof of such proposed allegation was inadmissible, as it went to contradict or vary the deed, and also that it was not allowable under the code of procedure, as it went to make out a new case, and to remedy a failure of proof. The court overruled the objections and allowed the amendment on condition that it be deemed traversed by the answer.

The plaintiff then proved by parol that the deed was given as a collateral security for money owing to him by Slamm, and also to cover expected advances. The parties then rested.

The defendant's counsel then submitted that the testimony showed an absolute title in the plaintiff under the deed: that if as between the immediate parties to it it might be construed as a

mortgage, yet as to the defendant it was what it purported to be, an absolute deed. The court overruled the objection and directed a verdict for the plaintiff. The judgment rendered upon the verdict was affirmed by the court *en banc*, and the defendant appealed.

JOHNSON, J. The determination of the judge in allowing the amendment of the pleadings was within his discretionary power, and is not the subject of review, in this Court.

The remaining question in the cause relates to the existence of an insurable interest in Slamm at the time of the assignment of the policy to Hodges and of the loss. If such an interest existed, then the plaintiff's recovery cannot be disturbed.

Upon the evidence there is no doubt of the following facts: That at the time when the insurance was effected, September 1, 1848, Slamm was the owner in fee of the premises insured; that on the 4th of September, 1848, he conveyed the premises to Hodges by a deed absolute upon its face, but intended to operate as a mortgage, and that upon the same day he transferred the policy to Hodges as collateral security, and that this transfer was made by the assent of the company.

If there is no rule of law forbidding us to take notice of the fact that the deed was intended as a mortgage, then beyond all question Slamm as the owner of the equity of redemption in the premises had an interest in the insurance which had been effected by him as the owner of the fee, and the assignment with the company's assent transferred this interest to Hodges as collateral security, and he may upon the ground of the same interest sustain the recovery which has been had in this case.

The question then, taking it most strongly against the plaintiff, is, whether in equity Slamm might have a bill to redeem against Hodges, notwithstanding the deed was absolute upon its face. *Webb v. Rice*, 6 Hill, 219, does not conflict with the proposition that such a bill might be maintained. It only professes to decide that at law unwritten evidence is inadmissible to show that a deed was intended as a mortgage. From an early day in this State the admissibility of such evidence had been established as the law of our Courts of Equity, and it is not fitting that the question should now be re-examined. Upon the authority of *Strong v. Stewart*, 4 J. C. 167; *Clark v. Henry*, 2 Cow. 332; *Whittick v. Kane*, 1 Paige, 206; *Van Buren v. Olmstead*, 5 Paige, 10; *McIntyre v. Humphreys*, 1 Hoff. 34, with which agree *Taylor v. Little*, 2 Sumner, 228; *Jenkins v. Eldredge*, 3 Story, 293, in all which cases, except *Clark v.*

Henry, the point was directly before the Court, we think that the plaintiff's recovery in this case ought to be sustained.

RUGGLES, Ch. J., and GARDINER, JEWETT and MORSE, JJ., concurred with JUDGE JOHNSON in favor of affirming the judgment.

WILLARD,¹ TAGGART and MASON, JJ., were for its reversal.

Judgment affirmed.

DESPARD *v.* WALBRIDGE

COURT OF APPEALS OF NEW YORK, 1857

(15 N. Y. 374)

THIS action was brought to recover for the use and occupation of a store, in Buffalo, by the defendant, from May 1st, 1851, to August 1st, 1851, which the complaint averred to be worth \$375. It also averred that the defendant on May 1st, 1851, agreed to pay for such use and occupation \$1500 per annum, payable quarterly. The action was tried before a referee, who found the following facts: On the 8th of March, 1850, one Sherwood demised to H. B. Ritchie the store above mentioned, and another adjoining, for two years from the first of May then next, with a right of renewal on certain conditions, Ritchie convenanting to pay a certain rent. On the 17th of November, 1850, Ritchie assigned this lease and his title to the term thereby granted to the plaintiff. At the time of such assignment the defendant was in possession of the premises as a sub-tenant of Ritchie, under a lease executed April 30th, 1850, for the term of one year from May 1st, 1850.

Sherwood, the original lessor, on the 9th of October, 1850, assigned his interest in the lease executed by Ritchie to Robert Codd for the purpose of securing a debt which he owed to Codd. On the 19th of November, 1850, Ritchie assigned to Codd all his interest as landlord in the sub-lease executed between himself and the defendant. The defendant occupied the premises under the lease from Ritchie, and after the assignment thereof to Codd paid the rent to the latter. On the 1st day of May, 1851, the plaintiff served on the defendant a written notice that he was the assignee of Ritchie's term, and that in case the defendant held over beyond his term, then at the point of expiring, the plaintiff would consider the premises as held and taken by defendant for the term of one

¹ The dissenting opinion of WILLARD, J., is omitted. It followed *Webb v. Rice*, 6 Hill (N. Y.), 219 (1843).

year from May 1st, 1851, at the annual rent of \$1500, payable quarterly.

The plaintiff, having proved these facts, rested his case, and the defendant moved for a non-suit, which being refused by the referee, he took an exception. Other exceptions were taken upon the trial, and to the referee's report, which, with the facts relating thereto, sufficiently appear in the opinion of the court. The referee reported that the defendant occupied under an implied agreement to pay what the occupation of the premises was reasonably worth, which he found to be at the rate of \$1200 per annum. Judgment was entered upon his report, which was affirmed by the Supreme Court at general term, and the defendant appealed.

SELDEN, J.¹ . . . The principal question is that which arises upon the exception stated in the referee's report. It is set forth in the answer, in substance, that the assignment of the Sherwood lease from Ritchie to the plaintiff was made at the request and for the benefit of Codd, and for the sole purpose of aiding the latter in the collection of his debt against Sherwood. It is also stated that this debt had been fully paid before May 1st, 1851, by Hiram E. Howard, who had succeeded to the rights of Sherwood in the premises, and that Ritchie, on the 1st of May, 1851, surrendered all his rights in the premises to Howard, whose tenant the defendant then became. These facts the defendant offered to prove and his offer was rejected. . . .

But it is urged that the proof offered was properly excluded for another reason. The assignment to the plaintiff being absolute in its terms, it is said that parol evidence was inadmissible to show that it was intended as security merely; and the case of *Webb v. Rice*, 6 Hill, 219, is cited in support of this position. It was held in that case that in an action at law parol evidence could not be received to show that a deed, absolute upon its face, was intended as a mortgage. It was conceded, however, that the rule was settled otherwise in equity. In the case of *Hodges v. The Tennessee Insurance Company*, 4 Seld. 416, this court held that the rule in equity continued the same since the case of *Webb v. Rice* as before. The only question, therefore, upon this subject is whether the equity rule is applicable to the present case, which is a purely legal action. As, however, since the enactment of the Code of Procedure a defendant may avail himself of an equitable as well as a legal defense in all cases, whatever may be the nature of the

¹ Portions of the opinion are omitted.

action, there would seem to be but little room for doubt upon the point (*Dobson v. Pierce*, 2 Kern, 156; *Crary v. Goodman*, *id.* 266; Code, § 150, subd. 2). That a deed absolute on its face was intended as a mortgage, would, before the Code, have been an equitable defense, because it could not have been proved at law. In order that it should now be made available in legal actions, as provided by the Code, the evidence to establish it must be admitted in that class of actions.

It may still be said that, admitting it to be shown that the assignment to the plaintiff was merely collateral to the debt of Sherwood to Codd, and that this debt had been fully paid prior to May 1st, 1851, yet so long as the lease was not reassigned, the legal title remained in the plaintiff, and that Ritchie could not surrender the lease while this title remained outstanding. The answer to this is, that if the assignment was collateral, it is the same as if the condition had been incorporated in the assignment itself, that upon payment of the debt the rights of the assignee should cease; and in such a case it is clear that no formal reassignment would be necessary. Whatever might be the effect of such an assignment in the hands of a subsequent *bona fide* assignee, it cannot be set up by the original assignee as evidence of a subsisting title in him, after full performance of the conditions upon which it was made.

There is still another question of fact which arose at the trial, but which was not passed upon by the referee, viz., whether the assignment to the plaintiff was intended as a security not only for the debt of Sherwood to Codd, but for that of Ritchie also. Should it turn out upon the new trial that the lease was assigned as security for both debts, and either remained unpaid on the 1st of May, 1851, then the case on the part of the plaintiff would be made out.

The judgment must be reversed and a new trial must be ordered, with costs to abide the event.

All the judges who had heard the argument concurring in this opinion,

*New trial ordered.*¹

¹ That such evidence is admissible at law, see *Jackson v. Lodge*, 36 Cal. 28 (1868), elaborately reviewing the authorities; *McAnnulty v. Seick*, 59 Ia. 586 (1882); Calif. Civ. Code, 1885, § 2925; No. Dak. Civ. Code, 1895, § 4703.

As to the weight of evidence required to prove an absolute deed a

mortgage, see *Wilson v. Parshall*, 129 N. Y. 223 (1891), where EARL, J., said at page 225: "The security of titles and sound public policy require that a party, alleging that a deed absolute in form is, nevertheless, a mortgage, should show it by *very satisfactory* evidence, and where he attempts to show it by oral evidence,

CAMPBELL v. DEARBORN

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1872

(109 Mass. 130)

BILL in equity,¹ filed July 12, 1869, to compel a reconveyance of land by the defendant to the plaintiff, on the ground that the plaintiff's conveyance of it to the defendant, although in form absolute, was in substance a mortgage.

The bill alleged that the plaintiff on June 11, 1866, agreed with Artemas Tirrill for the purchase by him from said Tirrill of a parcel of land in Charlestown, and at the same time Tirrill gave him a bond to convey the land at any time within three years from said June 11, upon the payment to him of \$5500, the plaintiff to pay all assessments upon the land meanwhile; that since taking the bond the plaintiff has occupied the land; that in the early part of June, 1869, he made arrangements to borrow the sum of \$5500 from Charles J. Walker, in order to tender the same to Tirrill, and secure performance of his obligation to convey, within the time fixed in the bond; that on June 11, 1869, being disappointed in finding Walker, he met the defendant; that the defendant expressed regret that the plaintiff should be obliged to lose fulfilment of the bond through not having in time the money required, and voluntarily offered to lend to the plaintiff the required amount, and the plaintiff accepted the offer as an act of friendship, as he supposed; that the defendant and the plaintiff went immediately to Tirrill and tendered to him said sum of \$5500, and Tirrill thereupon delivered to the plaintiff his deed of the land in fee simple, in compliance with the bond, which deed was dated May 21, and was acknowledged before the defendant as a justice of the peace on said June 11, 1869; that upon leaving Tirrill the defendant said to the plaintiff that he ought to be secured for his loan in some way, and proposed that they should go to the defendant's attorney, to have the necessary papers prepared; that they thereupon went to the attorney's office, where the defendant and the attorney consulted together privately, and, without consulting the plaintiff, an instrument was drawn, and handed to him to sign, which upon

his proof should amount to more than a mere guess or surmise, or even inferences which are just as

consistent with one theory of the deed as with the other."

¹ The statement of facts has been curtailed.

reading he found to be drawn to convey the land in fee simple to the defendant; that the plaintiff objected to this form of conveyance, and desired to have a mortgage drawn instead, but was assured by both the attorney and the defendant that the instrument prepared would have the same effect; that, being ignorant of the legal effect of said instrument made under such circumstances, and relying on the statements of the attorney and the defendant, he on said June 11 executed and delivered said deed to the defendant; and that it was recorded in the registry of deeds at the same time with Tirrill's deed. . . .

The defendant, in his answer, denied that he ever made or offered to make any loan to the plaintiff; alleged that, on the contrary, he refused a request of the plaintiff for a loan; and further alleged that "the defendant agreed to pay Tirrill the said sum of \$5500 for the premises described in the bill, provided the title to said premises should stand in the defendant's name," and the plaintiff agreed that immediately on payment of the sum to Tirrill the land should be conveyed in fee simple to the defendant, "and the plaintiff should not have any interest or title thereto," that thereupon the defendant paid the \$5500 to Tirrill, and Tirrill executed and delivered to the plaintiff a deed of the land. . . .

WELLS, J. Regarding the money paid to Tirrill for the land as the money of the plaintiff, by loan from the defendant, there is still no resulting trust in favor of the plaintiff arising from the whole transaction. A deed was taken to the plaintiff, according to his equitable interest; and he thereupon conveyed to the defendant by his own deed. The recitals and covenants of that deed preclude him from setting up any trusts by implication, against its express terms (*Blodgett v. Hildreth*, 103 Mass. 484). His agreement with the defendant for a reconveyance cannot be enforced as a contract for an interest in lands (Gen. Sts., c. 105, § 1), nor will it create an express trust (Gen. Sts., c. 100, § 19). The question then is, Can the deed be converted into a mortgage, or impeached and set aside, or its operation restricted, upon any ground properly cognizable in a court of chancery?

This question was somewhat discussed, though not decided, in *Newton v. Fay*, 10 Allen, 505. Some suggestions were made as to the bearing of the statute of frauds upon it, in *Glass v. Hulbert*, 102 Mass. 24. For the reasons there suggested, we do not regard the statute of frauds as interposing any insuperable obstacle to the granting of relief in such a case; because relief, if granted, is

attained by setting aside the deed; and parol evidence is availed of to establish the equitable grounds for impeaching that instrument, and not for the purpose of setting up some other or different contract to be substituted in its place. If proper grounds exist and are shown for defeating the deed, the equities between the parties will be adjusted according to the nature of the transaction and the facts and circumstances of the case; among which may be included the real agreement. It does not violate the statute of frauds, to admit parol evidence of the real agreement, as an element in the proof of fraud or other vice in the transaction, which is relied on to defeat the written instrument.¹

What will justify a court of chancery in setting aside a formal deed, and giving the grantor an opportunity to redeem the land, on the ground that it was conveyed only for security, although no defeasance was taken, is a question of great difficulty, and one upon which there exists a considerable diversity of adjudication, as well as of opinion. In Story Eq., § 1018, it is stated in general terms to be "fraud, accident and mistake." In 4 Kent Com., 6th ed., 142, 143, it is laid down that "parol evidence is admissible in equity, to show that an absolute deed was intended as a mortgage, and that the defeasance was omitted or destroyed by fraud, surprise or mistake." "It is determined, on the statute of frauds, that, if a mortgage is intended by an absolute conveyance in one deed and a defeasance making it redeemable in another, the first is executed, and the party goes away with the defeasance, that is not within the statute of frauds" (*Dixon v. Parker*, 2 Ves. Sen. 219, 225). Similar declarations are to be found in *Walker v. Walker*, 2 Atk. 98; *Joynes v. Statham*, 3 Atk. 388, and *Maxwell v. Mountacute*, Pre. Ch. 526; and adjudications in *Washburn v. Merrills*, 1 Day, 139; *Daniels v. Alvord*, 2 Root, 196, and *Brainerd v. Brainerd*, 15 Conn. 475; and see Story Eq., § 768.

| This indeed is only one form of application of the general rule

¹ In *Pierce v. Robinson*, 13 Cal. 116 (1859), FIELD, J., said: "As the equity upon which the courts act arises from the real character of the transaction, it is of no consequence in what manner this character is established, whether by deed or other writing, or by parol. Whether the instrument, it not being apparent on its face, is to be regarded as a mortgage, depends upon the circum-

stances under which it was made, and the relations subsisting between the parties. Evidence of these circumstances and relations is admitted, not for the purpose of contradicting or varying the deed, but to establish an equity superior to its terms. It is against the policy of the law to allow irredeemable mortgages, just as it is against the policy of the law to allow the creation of inalienable estates."

of equity, that one, who has induced another to act upon the supposition that a writing had been or would be given, shall not take advantage of that act, and escape responsibility himself, by pleading the statute of frauds on account of the absence of such writing, which has been caused by his own fault. Besides the cases cited in *Glass v. Hulbert*, 102 Mass. 24, see *Bartlett v. Pickersgill*, 1 Eden, 515; s. c. 1 Cox Ch. 15; Browne on St. of Frauds, § 94. But this principle will not help the plaintiff here, because he does not allege that any defeasance was intended or expected; and it is found by the report that the deed "was executed by the plaintiff intelligently, and not by accident or mistake, and that no fraud was practised to procure its execution, other than may be inferred" from the facts stated.

From those facts, and from the bill and answer, we think these points must be taken to be established, to wit, 1st, that the plaintiff had purchased the parcel of land in controversy and held a contract from Tirrill for its conveyance to himself upon payment of the sum of \$5500; 2d, that the money was paid to Tirrill, and the land conveyed by Tirrill to the plaintiff, in fulfilment of that contract; 3d, that the money was advanced by the defendant to the plaintiff as a loan, and the deed from the plaintiff to the defendant was given by way of security therefor. The report finds, "from all the circumstances surrounding the transaction, and from the acts and declarations of the parties at the time, that the plaintiff believed and had reason to believe" this to be the case.

The defendant, in his answer, does not pretend that he ever made any contract, either with Tirrill or the plaintiff, by which a price was agreed upon to be paid by him as and for the purchase of the premises for himself. His only allegation to this point is, at most, indirect and equivocal. He denies that said estate was purchased of Tirrill for the plaintiff's benefit, "neither did this defendant agree to purchase it for the benefit of the plaintiff, but for the use and benefit of the defendant." This is followed by an argumentative assertion of equitable title acquired as a resulting trust from payment of the purchase money, and that the deed from the plaintiff was given "for the purpose of vesting both the legal and equitable title in the defendant." He does allege that he "agreed to pay Tirrill the said sum of \$5500 for the premises described in the bill, provided the title to said premises should stand in the defendant's name." He alleges, with sufficient fulness and minuteness, that he refused to make a loan of the money to the plaintiff both "before and at the time of said payment to said Tirrill," and

refused "to allow the plaintiff to have any interest in said money, or the premises purchased therewith," and that it was agreed that the premises should be conveyed in fee simple to the defendant, "and the plaintiff should not have any interest or title thereto." He further avers "that, before the plaintiff signed and executed his deed to this defendant, said deed was read in the presence and hearing of the plaintiff, and he was then and there informed that the same was an absolute conveyance, and that he ceased thereby to have any interest whatever therein." Taking the facts to be literally as thus alleged, they significantly suggest the inference that the money was advanced by the defendant for the accommodation of the plaintiff in his purchase of the land, and the deed given to the defendant for his security therefor; but that it was agreed between them that the plaintiff should retain no legal right of redemption. He was to trust himself wholly to the good faith and forbearance of the defendant.

It is alleged in the bill, and not denied in the answer, that the land has been all the time in the occupation of the plaintiff. We think it is also to be inferred that the land is of considerably greater value than the sum advanced by the defendant.

From the whole case we are satisfied that it was a transaction between borrower and lender, and not a real purchase of the land by the defendant. We are brought, then, to the question, Can equity relieve in such a case?

The decisions in the courts of the United States, and the opinions declared by its judges, are uniform in favor of the existence of the power, and the propriety of its exercise by a court of chancery (*Hughes v. Edwards*, 9 Wheat. 489; *Sprigg v. Bank of Mount Pleasant*, 14 Pet. 201, 208; *Morris v. Nixon*, 1 How. 118; *Russell v. Southard*, 12 How. 139; *Taylor v. Luther*, 2 Sumner, 228; *Flagg v. Mann*, *id.* 486; *Jenkins v. Eldredge*, 3 Story, 181; *Bentley v. Phelps*, 2 Woodb. & Min. 426; *Wyman v. Babcock*, 2 Curtis C. C. 386, 398; *s. c.* 19 How. 289). Although not bound by the authority of the courts of the United States, in a matter of this sort, still we deem it to be important that uniformity of interpretation and administration of both law and equity should prevail in the state and federal courts. We are disposed therefore to yield much deference to the decisions above referred to, and to follow them, unless we can see that they are not supported by sound principles of jurisprudence, or that they conflict with rules of law already settled by the decisions of our own courts.

We cannot concur in the doctrine advanced in some of the cases,

that the subsequent attempt to retain the property, and refusal to permit it to be redeemed, constitute a fraud and breach of trust, which affords ground of jurisdiction and judicial interference. There can be no fraud or legal wrong in the breach of a trust from which the statute withholds the right of judicial recognition. Such conduct may sometimes appear to relate back, and give character to the original transaction, by showing, in that, an express intent to deceive and defraud. But ordinarily it will not be connected with the original transaction otherwise than constructively, or as involved in it as its legitimate consequence and natural fruit. In this aspect only can we regard it in the present case.

The decisions in the federal courts go to the full extent of affording relief, even in the absence of proof of express deceit or fraudulent purpose at the time of taking the deed, and although the instrument of defeasance "be omitted by design upon mutual confidence between the parties." In *Russell v. Southard*, 12 How. 139, 148, it is declared to be the doctrine of the court, "that, when it is alleged and proved that a loan on security was really intended, and the defendant sets up the loan as payment of purchase money, and the conveyance as a sale, both fraud and a vice in the consideration are sufficiently averred and proved to require a court of equity to hold the transaction to be a mortgage." The conclusion of the court was, "that the transaction was in substance a loan of money upon security of the farm, and, being so, a court of equity is bound to look through the forms in which the contrivance of the lender has enveloped it, and declare the conveyance of the land to be a mortgage."

This doctrine is analogous, if not identical with that which has so frequently been acted upon as to have become a general if not universal rule, in regard to conveyances of land where provision for reconveyance is made in the same or some contemporaneous instrument. In such cases, however carefully and explicitly the writings are made to set forth a sale with an agreement for repurchase, and to cut off and renounce all right of redemption or reconveyance otherwise, most courts have allowed parol evidence of the real nature of the transaction to be given, and, upon proof that the transaction was really and essentially upon the footing of a loan of money, or an advance for the accommodation of the grantor, have construed the instruments as constituting a mortgage; holding that any clause or stipulation therein, which purports to deprive the borrower of his equitable rights of redemption, is oppression, against the policy of the law, and to be set aside by the courts as void (4

Kent Com., 6th ed., 159; Cruise Dig., Greenl. ed., tit. xv, c. 1, § 21; 2 Washb. Real Prop., 3d ed., 42; Williams on Real Prop., 353; Story Eq., § 1019; Adams Eq. 112; 3 Lead Cas. in Eq., 3d Am. ed.; White & Tudor's notes to *Thornborough v. Baker*, pp. 605 [*874] & seq.; Hare & Wallace's notes to s. c. pp. 624 [*894] & seq.).

The rule has been frequently recognized in Massachusetts, where, until 1855, the courts have held their jurisdiction of foreclosure and redemption of mortgages to be limited to cases of a defeasance contained in the deed or some other instrument under seal (*Erskine v. Townsend*, 2 Mass. 493; *Kelleran v. Brown*, 4 Mass. 443; *Taylor v. Weld*, 5 Mass. 109; *Carey v. Rawson*, 8 Mass. 159; *Parks v. Hall*, 2 Pick. 206, 211; *Rice v. Rice*, 4 Pick. 349; *Flagg v. Mann*, 14 Pick. 467, 478; *Eaton v. Green*, 22 Pick. 526). The case of *Flagg v. Mann* is explicit, not only upon the authority of the court thus to deal with the written instruments of the parties, but also upon the point of the competency of parol testimony to establish the facts by which to control their operation; although, upon consideration of the parol testimony in that case, the court came to the conclusion that there was a sale in fact, and not a mere security for a loan.

By the St. of 1855, c. 194, § 1, jurisdiction was given to this court in equity "in all cases of fraud, and of conveyances or transfers of real estate in the nature of mortgages" (Gen. Sts. c. 113, § 2). The authority of the courts, under this clause, is ample. It is limited only by those considerations which guide courts of full chancery powers in the exercise of all those powers.

If then the advantage taken of the borrower by the lender, in requiring of him an agreement that he will forego all right of redemption in case of non-payment at the stipulated time, or an absolute deed with a bond or certificate back, which falsely recites the character of the transaction, representing it to be a sale of the land with a privilege of repurchase, be a sufficient ground for interference in equity by restricting the operation of the deed, and converting the writings into a mortgage, contrary to the expressed agreement, it is difficult to see why the court may not and ought not to interpose to defeat the same wrong, when it attempts to reach its object by the simpler process of an absolute deed alone. In each case the relief is contrary to the terms of the written agreement. In one case it is against the express words of the instrument or clause relied on as a defeasance, on the ground that those words are falsely written as a cover for the wrong practised, or an evasion of the

right of redemption. In the other it is without an instrument or clause of defeasance, on the ground that it was oppressive and wrongful to withhold or omit the formal defeasance. In strictness, there is no defeasance in either case. The wrong on the part of the lender or grantor, which gives the court its power over his deed, is the same in both. "For they who take a conveyance as a mortgage without any defeasance are guilty of a fraud" (*Cotterell v. Purchase*, Cas. temp. Talbot, 61). See also *Barnhart v. Green-shields*, 9 Moore P. C. 18; *Baker v. Wind*, 1 Ves. Sen. 160; *Mellor v. Lees*, 2 Atk. 494; *Williams v. Owen*, 5 Myl. & Cr. 303; *Lincoln v. Wright*, 4 De Gex & Jones, 16.

As a question of evidence, the principle is the same. In either case the parol evidence is admitted, not to vary, add to or contradict the writings, but to establish the fact of an inherent fault in the transaction or its consideration, which affords ground for avoiding the effect of the writings, by restricting their operation, or defeating them altogether. This is a general principle of evidence, well established and recognized both at law and in equity (*Stackpole v. Arnold*, 11 Mass. 27; *Fletcher v. Willard*, 14 Pick. 464; 1 Greenl. Ev., § 284; *Perry on Trusts*, § 226).

The reasons for extending the doctrine, in equity, to absolute deeds, where there is no provision for reconveyance, are ably presented by Hare & Wallace in their notes to *Woollam v. Hearn*, 2 Lead Cas. in Eq., 3d Am. ed., 676, and to *Thornborough v. Baker*, 3 *id.* 624. See also *Adams Eq.*, 111; 1 Sugd. Vend., 8th Am. ed., Perkins notes, pp. 267, 268, 302, 303. The doctrine thus extended is declared, in numerous decisions, to prevail in New York; also in Vermont and several other States. Mr. Washburn, in his chapter on Mortgages, § 1, has exhibited the law as held in the different States, in this particular; and the numerous references there made, as well as by the annotators in the other treatises which we have cited, render it superfluous to repeat them here (2 Washb. Real Prop., 3d ed., 35 & seq.). Upon the whole, we are convinced that the doctrine may be adopted without violation of the statute of frauds, or of any principle of law or evidence; and, if properly guarded in administration, may prove a sound and salutary principle of equity jurisprudence. It is a power to be exercised with the utmost caution, and only when the grounds of interference are fully made out, so as to be clear from doubt.

It is not enough that the relation of borrower and lender, or debtor and creditor, existed at the time the transaction was entered upon. Negotiations, begun with a view to a loan or security for

a debt, may fairly terminate in a sale of the property originally proposed for security. And if, without fraud, oppression, or unfair advantage taken, a sale is the real result, and not a form adopted as a cover or pretext, it should be sustained by the court. It is to the determination of this question that the parol evidence is mainly directed.

The chief inquiry is, in most cases, whether a debt was created by the transaction, or an existing debt, which formed or entered into the consideration, continued and kept alive afterwards. "If the purchaser, instead of taking the risk of the subject of the contract on himself, take a security for repayment of the principal, that will vitiate the transaction, and render it a mortgage security" (1 Sugd. Vend., 8th Am. ed., 302, in support of which the citations by Mr. Perkins are numerous). But any recognition of the debt as still subsisting, if clearly established, is equally efficacious; as the receipt or demand of interest or part payment (*Eaton v. Green*, 22 Pick. 526, 530).

Although proof of the existence and continuance of the debt, for which the conveyance was made, if not decisive of the character of the transaction as a mortgage, is most influential to that effect; yet the absence of such proof is far from being conclusive to the contrary (*Rice v. Rice*, 4 Pick. 349; *Flagg v. Mann*, 14 Pick. 467, 478; *Russell v. Southard*, 12 How. 139; *Brown v. Dewey*, 1 Sandf. Ch. 56). When it is considered that the inquiry itself is supposed to be made necessary by the adoption of forms and outward appearance differing from the reality, it is hardly reasonable that the absence of an actual debt, manifested by a written acknowledgment or an express promise to pay, should be regarded as of more significance than the absence of a formal defeasance. It of course compels the party attempting to impeach the deed to make out his proofs by other and less decisive means. But as an affirmative proposition it cannot have much force.

A mortgage may exist without any debt or other personal liability of the mortgagor. If there is a large margin between the debt or sum advanced and the value of the land conveyed, that of itself is an assurance of payment stronger than any promise or bond of a necessitous borrower or debtor. Hence inadequacy of price, in such case, becomes an important element in establishing the character of the transaction. Inadequacy of price, though not of itself alone sufficient ground to set in motion chancery powers of the court, may nevertheless properly be effective to quicken their exercise, where other sufficient ground exists (*Story Eq.*, §§ 239,

245, 246); and in connection with other evidence may afford strong ground of inference that the transaction purporting to be a sale was not fairly and in reality so (Kerr on Fraud and Mistake, 186 and note; *Wharf v. Howell*, 5 Binn. 499).

Another circumstance, that may and ought to have much weight, is the continuance of the grantor in the use and occupation of the land as owner, after the apparent sale and conveyance (*Cotterell v. Purchase*, Cas. temp. Talbot, 61; *Lincoln v. Wright*, 4 De Gex & Jones, 16). These several considerations have more or less weight, according to the circumstances of each case (*Conway v. Alexander*, 7 Cranch, 218; *Bentley v. Phelps*, 2 Woodb. & Min. 426). It is not necessary that all should concur to the same result in any case. Each case must be determined upon its own special facts; but those should be of clear and decisive import.

In the present case, we are able to arrive at the clear and satisfactory conclusion that there was no real purchase of the land by the defendant, either from Tirrill or from the plaintiff; that his advance of the purchase money at the request of the plaintiff created a debt upon an implied assumpsit, if there was no express promise; and that it was the expectation of both parties that the money would be repaid soon and the land reconveyed. Whatever may have been the intention of the defendant, he must have known that this was the expectation of the plaintiff; and it is most favorable to him to suppose that it was his own expectation also. These conclusions are not in the least modified in his favor by an examination of his answer.

We must declare therefore that in equity he holds the title subject to redemption by the plaintiff in such manner and upon such terms as shall be determined upon a hearing therefor before a single justice.

*Decree accordingly.*¹

¹ See also, *Horn v. Keteltas*, 46 N. Y. 605 (1871); *Oberdorfer v. White*, 25 Ky. L. Rep. 1629, 78 S. W. 436 (1904); *Cullen v. Carey*, 146 Mass. 50 (1888); *Reich v. Cochran*, 213 N. Y. 416 (1914).

The view that fraud, mistake or undue influence must be shown, once general, has been for the most part abandoned. See, for example, *Brainerd v. Brainerd*, 15 Conn. 575 (1843) and *French v. Burns*, 35 Conn. 359 (1868). It survives, however, in a

few States (*Norris v. McLam*, 104 N. C. 159 [1889]; Ga. Code, 1895, § 2725; Miss. Ann. Code, § 4233), and its influence may be traced in many others (*Stutphen v. Cushman*, 35 Ill. 186 [1864]; *Stinchfield v. Milliken*, 71 Me. 567 [1880]; *Russell v. Southard*, 12 How. 139, 147-8 [1851]).

"It will be perceived that in none of these cases did the court attempt to range the jurisdiction to turn an absolute deed into a mortgage, by parol evidence, under any specific

N. H. GEN. LAWS, c. 136. § 1. Every conveyance of lands, made for the purpose of securing the payment of money, or the performance of any other thing in the condition thereof stated, is a mortgage within the meaning of this chapter.

§ 2. No conveyance in writing of any lands shall be defeated, nor any estate encumbered by any agreement, unless it is inserted in the condition of the conveyance and made part thereof, stating the sum of money to be secured or other thing to be performed. (N. H. Public Statutes, 1901, Ch. 139, secs. 1-2.)

PENN. LAWS, 1881, No. 91. § 1. Be it enacted, &c., That no defeasance to any deed for real estate, regular and absolute upon its face, made after the passage of this act, shall have the effect of reducing it to a mortgage, unless the said defeasance is made at the time the deed is made and is in writing, signed, sealed, acknowledged and delivered by the grantee in the deed to the grantor, and is recorded in the office for the recording of deeds and mortgages in the county wherein the said lands are situated, within sixty days from the execution thereof; and such defeasances shall be recorded and indexed by the recorder.—Approved the 8th day of June, A. D. 1881.

head of equity, such as fraud, accident or mistake; but the rule seems to have grown into recognition as an independent head of equity. Still it must have its foundation in this, that where the transaction is shown to have been meant as a security for a loan, the deed will have the character of a mortgage, without other proof of fraud than is implied in showing that a conveyance, taken for the mutual benefit of both parties, has been appropriated solely to the use of the grantee. For when we seek in the standard authorities for the ground or principle upon which the doctrine of the admissibility of parol evidence originally rested, it will be found in the old and familiar heads of equity, such as fraud, accident, mistake or trust. Chancellor Kent, 4 Com. 143, states the doctrine thus: 'A deed, absolute on the face

of it, and though registered as a deed, will be valid and effectual as a mortgage, as between the parties, if it was intended by them to be merely a security for a debt, and this would be the case, though the defeasance was by an agreement resting in parol, for parol evidence is admissible in equity to show that an absolute deed was intended as a mortgage, and that the defeasance has been omitted or destroyed by fraud, surprise, or mistake.' Story, speaking of the same subject, says: 'Even parol evidence is admissible in some cases, as in cases of *fraud, accident, and mistake*, to show that a conveyance, absolute on its face, was intended between the parties to be a mere mortgage or security for money' (2 Eq. Jur., § 1018, note 2).—*Per McALLISTER, J., in Ruckman v. Alwood*, 71 Ill. 155 (1873).

GA. CODE, 1911. § 3258. A deed or bill of sale, absolute on its face and accompanied with possession of the property, shall not be proved (at the instance of the parties) by parol evidence to be a mortgage only, unless fraud in its procurement is the issue to be tried.¹

¹ Miss. Ann. Code, 1892, § 4233, is to the same effect.

CHAPTER III
THE OBLIGATION SECURED

SECTION I.—IS AN OBLIGATION NECESSARY?¹

BUCKLIN v. BUCKLIN

COURT OF APPEALS OF NEW YORK, 1864

(1 Abb. App. Cas. 242)

OLIVE E. BUCKLIN brought this action in the Supreme Court against William and George R. Bucklin, to foreclose a mortgage made by their ancestor, William Bucklin, Sr.

William Bucklin, Sr., and his wife, Esther, previous to his executing this mortgage had separated, and she had filed a bill in chancery for a judicial separation (a mensa et thoro) on the ground of his cruel treatment of her. In the bill she prayed that he might be compelled to maintain her, and that the custody of their infant daughter, Olive E., might be awarded to her. Upon the bill she obtained an injunction restraining him from molesting the child.

In order to compromise the controversy and stay the prosecution of the suit, the husband, William Bucklin, Sr., agreed to make provision for the support of his wife and the infant, together, and separate from himself, and convey a house and lot to the child within six months.

To effect this settlement the mortgage in suit was executed to Vedder Green (who appeared as the next friend of the wife in her

¹ "As to the objection that there was no covenant for the payment of the principal or interest, he said that was not material; the same not being necessary for the making of a mortgage, nor yet necessary that the right should be mutual—viz., for the mortgagee to compel the payment as well as for the mortgagor to compel a redemption; since such con-

veyance as in the present case, though without any covenant or bond for the payment of the money, would yet be plainly a mortgage."—Sir Joseph Jekyll, arguendo, in *Floyer v. Lavington*, 1 P. Wms. 268 (1714). See, also, *Acton v. Acton*, Finch, Pre. Ch. 237 (1704). And see Lit., § 338, and Co. Lit., 209, a, b, p. 6, *supra*.

divorce suit) and was expressed to be made to him in trust for the wife and infant daughter.

The mortgage, which was set forth in the complaint, recited the above facts, and after providing for the said support of the wife and daughter, and the suspension of proceedings in the suit, without modification or discontinuance, the mortgage contained the following language: "Now, for the purpose of securing the performance by the said William, of the aforesaid agreements and covenants on his part to be performed, this indenture witnesseth—that the said William Bucklin, in consideration of the premises, and also in consideration of the sum of one dollar, paid to the said William by the said Vedder Green, the receipt of which sum is hereby confessed and acknowledged, hath granted, bargained, sold," &c., "and doth grant," &c., to Vedder Green and his heirs and assigns forever (here was inserted the description of the lands; habendum to him, his heirs, and assigns, forever), "provided, that if the said William Bucklin shall within the period of six months convey to Olive Esther Bucklin real estate of the value of one thousand dollars, to consist of a dwelling," &c., and if he shall permit Esther to occupy the same without molestation, and if he shall pay to Esther Bucklin three hundred dollars annually during their joint lives, and shall permit the said Esther Bucklin to have the custody, management, &c., of said Olive Esther Bucklin, without any interference on his part (and if he should also perform certain other conditions relating to personal property), then this indenture shall be void. And it is hereby declared that this mortgage is given to Vedder Green in trust for the benefit of Esther Bucklin and her infant daughter, Olive Esther Bucklin. And in case the above conditions on the part of said William, or any of them, shall be broken, and it shall at any time hereafter be necessary to enforce this mortgage, the amount that shall be recovered on said mortgage shall be recovered for the benefit of the said Esther and her infant daughter or the survivor of them.

The complaint then averred that Bucklin, Sr., wholly failed to convey land and dwelling, &c., as he agreed (though payment of the annuity was admitted), and demanded judgment for the foreclosure of the mortgage for the sum of one thousand dollars, the value of the land and dwelling promised to be conveyed, and interest, &c.

When the mortgage was made, in 1836, the child (the present plaintiff) was about three years of age. The trustee, Vedder Green, died in 1841, the husband and wife died in 1843 and 1844.

In 1857, the daughter, coming of age, procured an order of court appointing her to enforce the trust and bring an action in her own name.

The defendants were heirs of the mortgagor in possession.

The judge before whom the cause was tried sustained the mortgage; found that the husband and wife never afterward cohabited, though for a short time they resided in the same house, and he gave judgment for plaintiff with interest from the date of the mortgage.

The Supreme Court, at General Term, affirmed this judgment, holding that this was an action on a sealed instrument, and, if the cause of action had accrued after the Code of Procedure went into effect, it would have been governed by section 90 of the Code, but that as it had accrued before that time, it was governed by 2 R. S., c. 8, tit. 3, art. 1, § 9, which enacts that the time which shall have elapsed between the death of any person, and the granting of letters testamentary or of administration on his estate, shall not be deemed any part of the time limited by any law, for the commencement of actions by executors or administrators. That had the trust descended to the personal representatives of the trustee, this cause of action would have been saved from the operation of the statute; and that the *cestui que trust* should not be prejudiced by having the trust fall on the court of chancery, as it did on the death of Green, but that an analogous rule should be applied, and the whole term of twenty-one years allowed in which to bring the action, which would prevent it from being barred.

From that judgment the defendants appealed to this court.

By the Court: DENIO, Ch. J. The mortgage, so far as it is now sought to be enforced, was created, among other objects, to secure the plaintiff, then an infant of tender age, a portion of her father's property, to aid in her maintenance during her infancy, and to furnish her with a small independent estate in real property. The differences which had arisen between her parents presented the occasion for this gift; but its validity did not depend upon the merits of that controversy, nor yet upon the legal effect of the agreement for a separation between her father and mother, nor upon the legality of the provisions made by the former for the latter. The contract, so far as it relates to that provision, has either been performed or it is now incapable of performance. The party entitled

to its benefits has been long dead, and it does not appear that she left any representative capable of enforcing any of its stipulations which were not performed at her death. Moreover, this suit was not brought to recover such interest. But the plaintiff survives, and is entitled to the settlement attempted to be made in her favor, provided it was legally valid when made, and provided her rights have not been lost by lapse of time.¹ }

1. Where the rights of creditors do not stand in the way, and there appear not to have been any in this case, it is perfectly lawful for a parent to make such provision out of his estate for a child or children, by present, gift or by testament, as he may think proper. There are cases in which a voluntary executory gift will not be enforced by the courts; but an executed one is as valid as though based on a full pecuniary consideration.

A mortgage is an executed conditional transfer of the real estate mortgaged. In judgment of law, any conveyance which would be sufficient to pass the title to a purchaser conveys it to the mortgagee. The instrument executed by William Bucklin to Vedder Green would be a perfect deed of bargain and sale but for the condition by which it was to become void upon performance of the agreement. It expresses a pecuniary consideration which, though nominal, is as adequate to waive a use as though it were the full value of the land, and though it may not have been paid, the defendant is estopped by his deed from denying its payment. By the Revised Statutes it is denominated a grant; but for all substantial purposes it has the effect of a deed of bargain and sale (1 R. S. 738, 739, §§ 137, 138, 142). At common law, and before the jurisdiction of courts of equity to relieve against forfeitures had been established, this deed would have vested in the trustee an estate in fee simple defeasible only by the performance of the conditions. This is, of course, a technical view of the nature of a mortgage. }

By applying to the transaction the equitable doctrines of the courts of equity, now also recognized to a great extent by the courts of law and by modern statutes, the mortgage is simply a security for the payment of the money it was given to secure, and the mortgagor continues to own the land, while the mortgagee's interest is that of a creditor only. }

But the defendants' position is formal also. They insist that }

¹ The second portion of the opinion, dealing with the effect of the lapse

of time, is omitted, the conclusion being reached that the Statute of Limitations was not a bar. ||

courts of equity will not decree the performance of a voluntary executory agreement even where the subject is a portion intended for a child or other relative, and authorities are referred to to sustain that position (*Duwall v. Wilson*, 9 Barb. 487, and cases cited; but see *Sowerby v. Arden*, 1 Johns. Ch. 240, 266, and cases referred to by Chancellor Kent). If the settlement be an executed one, like a deed or mortgage, the doctrine relied on has no application. The title of the mortgaged premises is transferred by legal conveyance. The mortgagor retains an equity of redemption, equivalent, for many purposes, to a general ownership of the land, but yet, in point of form, an equity. The mortgagee may, it is true, come into a court of equity to enforce his mortgage, as the mortgagor must in order to redeem. The reason why a mortgagee must resort to equity is not because the mortgage is an executory transaction, and requires the aid of a court of chancery to compel a specific performance. On non-performance of the conditions the mortgage is forfeited at law, but the equity of redemption remains in the mortgagor or his representatives. No prospective language of the parties which can be written is strong enough to produce the forfeiture of that equity, which can only be extinguished by a decree, or an equivalent proceeding, under a positive statute. This rule is expressed by the phrase, "once a mortgage, always a mortgage." The mortgagee cannot destroy this equity except by a suit in chancery or a statute foreclosure. Formerly, he could bring ejectment to get possession of the estate, after forfeiture at law, but that is now forbidden by statute. Still if he can be got into possession without a breach of the peace, his title under the mortgage deed is strong enough in law to enable him to defend an ejectment brought by the mortgagee (*Mickles v. Dillaye*, 17 N. Y. 80; *Mickles v. Townsend*, 18 *id.* 575). The plaintiff brings her suit in equity, not for the purpose of being aided in establishing her mortgage under the notion of remedying a defective conveyance, or obtaining a specific performance, but to foreclose and extinguish the defendants' equity of redemption, which a court of law is not competent to deal with. She does not come to establish a voluntary equitable agreement, but to enforce a legal title under an executed conveyance, and to cut off an equity attached to that legal title and vested in the defendants.

I think, therefore, that the instrument contained a valid mortgage of the land described in it, and that it was an available security for the performance of the contract to purchase and convey lands

to the value of one thousand dollars to and for the benefit of the plaintiff. //

H. R. SELDEN, J., was absent. All the other judges concurred.
*Judgment affirmed, with costs.*¹

CAMPBELL v. TOMPKINS

COURT OF CHANCERY OF NEW JERSEY, 1880

(32 N. J. Eq. 170)

BILL to foreclose. On final hearing on pleadings and proofs.

THE CHANCELLOR [RUNYON]. This suit is brought to foreclose a mortgage given, October 13th, 1868, by Daniel F. Tompkins and his wife to the complainant, on land of Mrs. Tompkins, to secure the payment, according to the bond of Mr. Tompkins to the complainant, of that date, of \$2100 in one year from the date thereof, with interest, and all national, state, county, city and township taxes which might be assessed upon the money loaned and thereby secured or upon the mortgage or bond. The defense set up by the mortgagors in their answer is, that only \$1100 were lent, and the rest of the \$2100 was an allowance by way of compensation for the trouble and expense to which the firm of Campbell, Lane & Co. (of which the complainant was a member and for which the bond and mortgage were taken, though taken in the name of the complainant alone) had been subjected by reason of the defense made by the firm of Nichols & Tompkins (of which Mr. Tompkins was a member), against certain promissory notes put by the latter firm on the money market, and bought by Campbell, Lane & Co. The notes amounted in the aggregate to over \$7000. The result of the litigations was that Campbell, Lane & Co. recovered only what they had paid for the notes, with interest. The litigations were ended and the money for which judgment was recovered therein paid before the mortgage was given.

When the agreement for the mortgage was made, Mr. Tompkins applied to the complainant for a loan of \$1000 on mortgage of the premises described in the mortgage. Wholly of his own accord, and without suggestion from the complainant, or any member of his firm, or any one else on his or their account, Mr. Tompkins pro-

¹ *Accord., Brigham v. Brown*, 44 Mich. 59 (1880), *per* COOLEY, J.: "A man may give a voluntary mortgage if he chooses" (p. 62).

posed that if the loan was made the mortgage would be given for such an amount as to include a sum sufficient to compensate Mr. Campbell's firm for their expense and trouble in prosecuting the suits upon the notes. This proposition was wholly voluntary on his part, and the amount of the proposed compensation (\$1000) was fixed by him.

Mr. Campbell acceded to the proposition thus made, and made the desired loan, the amount of which was, at the request of Mr. Tompkins, raised from \$1000 to \$1100, and took the mortgage. In 1876, before the commencement of this suit, the complainant bought the interest of his partners in the mortgage, so that when this suit was brought he was the sole owner of the mortgage.

By their answer, Mr. and Mrs. Tompkins insist that, as to the \$1000 included in the mortgage as compensation for expense, trouble, &c., in the litigations on the notes, the mortgage was without consideration, and that, therefore, there should be no decree for that money; or, if there should be any decree on that account, it should be for a smaller sum. They insist that \$1000 was an unreasonably large allowance on that account. Neither in the answer nor in the testimony is any fraud alleged or even hinted at. The conduct of the complainant appears to have been entirely fair. Nor is it alleged that any manner of deceit or misrepresentation was practised on Mrs. Tompkins, nor that she was not fully apprised of all the particulars of the transaction which resulted in the mortgage. The only question, therefore, is, whether the defence of want of consideration is available to the mortgagors.

The seals to the bond and mortgage import a consideration, and, before the passage of the act "concerning sealed instruments," which was approved April 6th, 1875 (Rev. p. 387), neither a court of law nor equity would allow the consideration of such instruments to be inquired into with a view to declaring the instrument void for want of consideration, but a court of equity would do so for the purpose of ascertaining what was due upon it (*Farnum v. Burnett*, 6 C. E. Gr. 87). That act provides that in every action upon a sealed instrument or where a set-off is founded upon a sealed instrument, the seal thereof shall be only presumptive evidence of a sufficient consideration, which may be rebutted as if such instrument was not sealed. That act is a mere change of the rule of evidence and does not operate to make a valuable consideration necessary where the requisite did not exist when the contract was made (*Aller v. Aller*, 11 Vr. 446).

As before stated, the mortgage in this case was given in 1868,

prior to the passage of that act. It cannot be doubted that even now a valid mortgage may be given where no valuable consideration exists. Otherwise, the absolute control of the owner over his property is taken away, for he would not be permitted to give it away in his lifetime by deed. The mere fact that there was no consideration would not now render the mortgage invalid. A mortgage may be sustained as against all except creditors whose claims existed at the time of giving it, although it was intended merely as a gift; and, when executed and delivered, it is as valid as if it were based upon a full consideration, and it is not open to the objection that it is a voluntary executory agreement, but it may be enforced according to its terms as an executed, conditional transfer of the real estate mortgaged (*Brooks v. Dalrymple*, 12 Allen, 102; *Bucklin v. Bucklin*, 1 Abb. App. Dec. 242; *Jones on Mort.*, § 614).

In this case there was no fraud, illegality or oppression. The act of the mortgagors in giving the mortgage to secure the payment of the compensation, was entirely voluntary and was the result of Mr. Tompkins's unsolicited and uninvited proposition. He made it part of the consideration of the loan which he solicited, and it is, perhaps, not too much to say that without this inducement the loan would not have been made.

The voluntary mortgage by the wife of her land to secure the payment of her husband's bond is binding upon her not only so far as the loan is concerned, but as to the debt voluntarily created by him against himself and arising from a merely moral obligation which he acknowledged without demand or even solicitation, but solely from his sense of justice. A married woman may, with her husband, mortgage her land to secure the payment of the debt of her husband or of any other person, for the payment of which she is in no way liable and in which she has no interest (*Jones on Mort.*, § 113). And her mortgage, given to secure the payment of the bond of her husband, will not be regarded as having no validity or binding effect simply because the consideration of the bond is an obligation merely moral and not enforceable at law or in equity.¹

There will be a decree in accordance with these views.

¹ See also *Riley v. Hopkinson*, 82 N. J. Eq. 469 (1913).

BAIRD v. BAIRD

COURT OF APPEALS OF NEW YORK, 1895

(145 N. Y. 659)

APPEALS from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon orders made October 2, 1894, which affirmed judgments in favor of defendants entered upon decisions of the special county judge of Monroe County on trial at Special Term, dismissing the complaint in each action.

The following is the opinion in full:

"Prior to the year 1873, John Baird, the plaintiff's husband and testator, was the owner of the farm which is covered by the two mortgages sought to be foreclosed in these actions. In that year, his two sons, William and James, defendants, went into possession of it, and the father directed the assessors to transfer the assessment on the farm to his sons. They have remained in possession ever since. In October, 1874, the father deeded the farm to the sons, who took title under these deeds as tenants in common. It appeared that the father had two other farms, all of which had been paid for and improved with the aid of the labor and services of his sons, who had worked for him after their majority. On a settlement between the father and the two sons, it was agreed that he was indebted to them in the sum of \$5000, and that was the consideration for the conveyance. A deed was given to each son conveying an undivided half of the farm in consideration of \$2500. The evidence tended to show, and the trial court has found, that the intention was to vest the title in the sons in fee; but it appears that the father had some fears that his sons would not be able to take care of the property thus conveyed and that it might be lost in speculation or otherwise. In order to prevent such a result, as he said, he required the sons to give back to him mortgages for \$1500 each on the farm. No bond was given and no actual debt was intended to be secured, and they were not recorded by the father in his lifetime. With respect to the purpose and consideration of these mortgages the testimony tended to show, and the trial court found, that they were not intended to secure any debt or to be or become a valid subsisting security, or to be recorded or enforced, and were, in fact, without any consideration whatever. In the year 1875 the wife of John Baird, and

mother of the defendants, died, and the year following he married the plaintiff. He died in 1883, leaving a will, in which the plaintiff was named as executrix. In that capacity she brought actions against each of the sons to foreclose the mortgages given by them respectively. The complaint was dismissed in each case and the judgments were affirmed at General Term. There are two appeals and two records, but both judgments rest on precisely the same facts, and the questions involved in both appeals are identical. Both cases may, therefore, be conveniently considered and disposed of as one.

"The plaintiff's right to enforce the mortgage is the same and no other than the mortgagee, her husband and testator, had in his lifetime. She stands in the place of her husband, and cannot enforce the instrument unless he could, and every defense that the defendants could urge against the mortgage during the life of the father, they may interpose now against his personal representative. The instruments purport to have been given to secure the payment of money, but it was shown at the trial affirmatively, and found by the trial court, that no debt in fact existed in favor of the father against either of the sons; that there was no intention to give the mortgage on the one hand, or to hold it on the other, as security for any debt; that in fact there was no legal or equitable consideration moving between the parties and no intention on either side to treat the instruments as binding obligations or as valid or subsisting securities. The evidence upon which these findings were made, if competent, was sufficient and the fact is not open to question or review here.

"The findings are based upon the business relations which the parties occupied to each other before the father gave up the possession of the farm to the sons and then conveyed it to them, taking back the mortgages in question, and upon his subsequent conduct and declarations as to the character of the instruments and the purpose of their execution and delivery. The general principle that an instrument under seal, in the form of a mortgage upon real estate, which upon its face expresses a consideration and purports to have been given as security for a debt may, nevertheless, as between the parties, be shown to have been purely voluntary or without any consideration, and so invalid, is not denied (*Davis v. Bechstein*, 69 N. Y. 440; *Hill v. Hoole*, 116 *id.* 299; *Briggs v. Langford*, 107 *id.* 680; *Thomas on Mort.*, § 847; *Jones on Mort.*, § 1297).

"The point upon which the learned counsel for the plaintiff relies is that evidence was not admissible at the trial to wholly

contradict and defeat the instruments by showing, contrary to what appeared on their face, that they were intended to have no operation whatever. It is sought to distinguish this case from that of a deed, absolute upon its face, which may be shown to be in fact a mortgage, and from the numerous other cases in which equity permits a party to show that an instrument, appearing upon its face to be of one character, is or ought to be in truth of quite another character. It is said that the principle upon which these cases rest gives no sanction to what was held by the court below in this case, that a party may impeach his deed by showing, not only that it was without consideration, but that it was intended to have no validity or become of any binding force whatever.

"The desire on the part of the father to retain some sort of guardianship over the title to the farm which he had conveyed to the defendants was, perhaps, natural enough under the circumstances, and it is frequently shown in such transactions. That the mortgages were not intended to be held by him for any other purpose is supported by the circumstances that no bond was given, that they were not recorded, and no claim was made by the mortgagee during his life, a period of about nine years, that they were in his hands for any other purpose or for the payment of either principal or interest though past due. All the circumstances, when considered with the proof of the statements and declarations of the father, were sufficient to warrant the findings of the trial court with respect to the real purpose with which the instruments were made and their true consideration (*Holmes v. Roper*, 141 N. Y. 67; *Lyon v. Ricker*, *id.* 225). "The presumption of some consideration that arose from the presence of a seal was overthrown, and we must assume that the instruments were without consideration of any kind (*Gray v. Barton*, 55 N. Y. 68; *Best v. Thiel*, 79 *id.* 15; *Torry v. Black*, 58 *id.* 185; *Home Ins. Co. v. Watson*, 59 *id.* 395; *Dubois v. Hermance*, 56 *id.* 673).

"There is no reason that we can perceive for giving to these instruments any greater force or effect than was contemplated by the parties when they were executed and delivered. There is no estoppel or any right which attached in favor of third parties, and we are not aware of any principle which would now require a court of equity to treat these instruments as valid subsisting obligations unless they were intended as such when made, and this is negatived by the findings.

"Nor do we perceive any good reason why the real purpose and

true consideration and object of the mortgages should not be made to appear when the aid of a court of equity is invoked for their enforcement. The authority relied upon by the learned counsel for the plaintiff in support of his contention is a remark of Judge Rapallo in the case of *Hutchins v. Hutchins*, 98 N. Y. 56, in which it is said: 'It has never been held that a deed can be so far contradicted by parol as to show that it was not intended to operate at all, or that it was the intention or agreement of the parties that the grantee should acquire no right whatever under it, or that he should reconvey to the grantor on his request without any consideration.'

"That remark must be understood with reference to the facts of the case then under consideration, which was the case of a deed absolute in form but intended as a mortgage. The defendant's answer was, however, so drawn as to leave room for the construction that he intended to urge that the conveyance was intended to be wholly inoperative, or in trust, or to secure a debt which the parties had agreed should never be paid, and it was with reference to this feature of the case that the expression was used. It was applicable to the case then under review, but cannot be regarded as authority for the proposition that the defendants in this case are precluded from showing that the mortgages were without any consideration in fact, or that they were not intended by any of the parties to have the effect of incumbering or defeating the title which the father had just conveyed to his sons. The rule which excludes evidence of parol negotiations or conditions, when offered to contradict or substantially vary the legal import of a written agreement, does not prevent a party to the agreement, in an action between the parties, from showing, by way of defense, the existence of a contemporaneous oral agreement, made at the time the writing was executed and delivered, which would render the use of the written instrument, for any purpose contrary to or inconsistent with the oral stipulation, dishonest or fraudulent (*Juilliard v. Chaffee*, 92 N. Y. 529). The consideration of a written instrument is always open to inquiry, and a party may show that the design and object of the agreement was different from what the language, if alone considered, would indicate (*id.*). Parol evidence may also be given to show that a writing, purporting to be a contract or obligation, was not in fact intended or delivered as such by the parties (*Grierson v. Mason*, 60 N. Y. 394). So, a conveyance absolute in form may be shown, as against the heir at law of the grantee, to have been made in trust for the benefit of a

partnership firm, of which the grantee was a member, and so held by him in trust for the firm (*Bank v. Grote*, 110 N. Y. 12). Of course there may be cases where the rights of innocent third parties intervene to modify or change the rules, as in the case of negotiable instruments, or where there exists some element of estoppel, but as between the parties to the instrument there is no reason why the truth, with respect to the real object and consideration of the instrument, may not be made to appear. The plaintiff was not entitled to maintain the actions for the foreclosure of the mortgages unless it was found that there was some debt due to her for the payment of which they were the security. The findings are that no debt ever existed, and this is conclusive against the plaintiff's right of action. In an action to enforce a mortgage by sale of the land the amount, if anything, of the lien is an issue which the parties certainly have the right to contest. It is the debt which gives the mortgage vitality as a charge upon the land, and generally where there is no debt or obligation there is no subsisting mortgage. The instruments contain a consideration clause and a seal, and much of what has been said by courts and writers to the effect that a party cannot be permitted to defeat his own deed by parol proof is based upon the importance which was attached to the presence of these conditions in an instrument by the common law. The conception that some consideration was necessary to support every promise and covenant was borrowed from the civil law, but the consideration was formerly deemed to be conclusively established by the presence of the consideration clause or the seal. It was originally supposed that the recitals and clauses of a contract expressing a consideration could not be varied by parol proof to the contrary, but that rule was gradually abandoned and now that clause is open to parol proof (*McCrea v. Purmot*, 16 Wend. 460; *Hebbard v. Haughian*, 70 N. Y. 54; *Ham v. Van Orden*, 84 *id.* 269). So also, the conclusive presumption of a consideration which formerly arose from the presence of a seal was modified by statute, and it is now open to the maker of such an instrument to allege and prove the absence of any consideration in fact as a defense (3 R. S. [5th ed.] 691, §§ 77, 78; Code, § 840).¹

"There are, it is true, expressions to be found in some cases to

¹ Section 840 of the New York Code Procedure reads: "A seal upon an executory instrument, hereafter executed, is only presumptive evidence of a sufficient consideration,

which may be rebutted, as if the instrument was not sealed."

See article, "The Magic of the Private Seal," by Justice Crane, 15 Col. Law Rev. 24 (1915).

the effect that while the question of consideration is open to be varied by parol proof, yet the party cannot be permitted to claim that a deed or other instrument with a consideration clause or a seal, or both, is wholly without consideration, and thus entirely defeat it. If the idea is anything more than a somewhat shadowy and fanciful remnant of the ancient law, it is not easy to define its precise scope or practical application when applied to an executory instrument like a mortgage. To say that in a case like this it is open to the defendant to reduce by parol proof the sum expressed as the consideration to one dollar or any other nominal sum, but that he cannot go any farther, would be to confess that the distinction, if it exists, is altogether without substance. The instrument would be defeated in either case. It is quite certain that by recent adjudications deeds and other instruments have been defeated, in a great variety of cases, by parol proof of want of consideration, or that they were delivered upon conditions which would render their use for any other object a fraud upon the maker, or that the purpose for which delivery was made was different from that indicated upon their face. It will be sufficient to refer to some of the cases without further comment: *Reynolds v. Robinson*, 110 N. Y. 654; *Blewitt v. Boorum*, 142 *id.* 357; *Andrews v. Brewster*, 124 *id.* 433. So, also, actions to foreclose mortgages have been defeated upon allegations and proof differing in no substantial respect from that appearing in this case (*Briggs v. Langford*, 107 N. Y. 680; *Hannan v. Hannan*, 123 Mass. 441; *Wearse v. Peirce*, 24 Pick. 141; *Hill v. Hoole*, 116 N. Y. 299; *Davis v. Bechstein*, 69 *id.* 440; *Parkhurst v. Higgins*, 38 Hun, 113). There may be cases, no doubt, where the party will be held estopped by his deed from claiming that it is void for want of consideration, especially where by its terms it appears to be an absolute conveyance of land (*Matter of Mitchell*, 61 Hun, 372). A voluntary conveyance, intended to take effect as such, and not executory, is generally good between the parties without actual consideration, but that principle has no application to this case. It is not quite correct to say that the defendant was permitted to show by parol that these instruments were never to have any operation or effect. They were in fact executed and delivered for a purpose, though not to secure the payment of money, and they may have accomplished the very object contemplated. That was to protect the defendants against their own improvidence in contracting debts upon the faith of their title to the farm. Whether that purpose was lawful, or practicable, or possible, or the contrary, is

quite foreign to the inquiry. It is enough to know that such was the motive and consideration in the minds of all the parties which induced the execution and delivery, and no other. Having procured them in that way, it would be unconscionable now for the mortgagee or his personal representative to use or enforce them as obligations for the payment of money.

"The defendants had been in possession of the farm under the final contract between them and their father to convey it to them, in consideration of the amount found due upon the settlement, for more than a year before the deeds or mortgages were given. During that time they were in a position to enforce specific performance, and hence the execution and delivery of the mortgages were purely voluntary acts on their part, and constituted, so far as appears, no element of the consideration for the deeds.

"The acts and declarations of the mortgagee with respect to the consideration, conditions and purpose under which the instruments were made and delivered, being admissions against his interests, would have been competent proof against him in a suit to enforce the mortgages in his lifetime, and hence are now competent against the plaintiff who represents him (*Holmes v. Roper*, 141 N. Y. 67; *Lyon v. Ricker*, *id.* 225; *Hobart v. Hobart*, 62 *id.* 80).

"We think there was no error in the result and that the judgments should be affirmed, with costs."

O'BRIEN, J., reads for affirmance.

BARTLETT, J., concurs; PECKHAM and GRAY, JJ., concur in the result; ANDREWS, Ch. J., dissents; HAIGHT, J., not sitting.

Judgments affirmed.

COOK v. BARTHOLOMEW

SUPREME COURT OF CONNECTICUT, 1891

(60 Conn. 24)

CARPENTER, J. This is a suit for the foreclosure of a mortgage, with the alleged mortgage annexed as an exhibit. The mortgage is in two parts—an ordinary deed for the consideration of \$900, duly executed to convey real estate, and a condition thereto attached, of the same date, and signed by the grantor, as follows: "The said Bostwick, for the consideration named in the within deed, covenants and agrees with said Charles Cook as such conservator, that he will receive said Sarah A. Bostwick into his care and keeping during the term of her natural life, that he will provide

for all her wants in a reasonable and proper way, will provide her with all needed food, drink and clothing, have a room and fire when needed, lodging and every necessary comfort, both in sickness and health, and at her decease give her decent and proper burial, and erect tombstones at her grave with a suitable inscription thereon, within one year after her decease, said tombstone to be of a value of not less than fourteen dollars. Now, therefore, if said Bostwick shall well and truly perform all and every of the above covenants and stipulations faithfully, then this deed to be void, otherwise to remain in full force and effect in law."

The complainant also alleges that the defendant, Bostwick, subsequently conveyed his interest in the premises to the defendant, Jones, and that Jones conveyed his interest to the other defendant, Bartholomew. The defendants demurred, and the case is reserved.

Whether the instrument sued on is or is not a mortgage is the principal question in the case. What is a mortgage? "A mortgage is a contract of sale executed, with power to redeem. . . . The condition of a mortgage may be the payment of a debt, the indemnity of a surety, or the doing or not doing any other act. The most common method is to insert the condition in the deed, but it may as well be done by a separate instrument of defeasance executed at the same time. . . . A bond or note is usually taken for the debt, which is described in the deed, with a condition that if the debt is paid by the time the deed shall be void. In such case the mortgage is called a collateral security for the debt. In like manner an engagement to indemnify, or any other agreement, may be described in the mortgage deed." 2 Swift's Digest, 182, 183. "To constitute a mortgage the conveyance must be made to secure the payment of a debt." *Bacon v. Brown*, 19 Conn. 29. "A conveyance of lands by a debtor to a creditor as a security for the payment of the debt." *Jarvis v. Woodruff*, 22 Conn. 548.

What is a debt? Amon Bostwick received \$900 from the plaintiff, in consideration of which he agreed to support Sarah A. Bostwick during life, and at her death to bury her and to erect a tombstone to her memory. To secure the performance of this agreement he executed this deed, with a condition that the deed should be void if the agreement should be performed. He assumed a duty which may be aptly described as a debt. He executed a deed of real estate as collateral security for the performance of that duty—the payment of that debt. The obligation falls within an approved definition of debt, and the conveyance is within the legal definition of a mortgage.

There is no force in the objection that this cannot be a mortgage because of the difficulty in ascertaining the amount of the debt, as clearly appears by the definitions. Of course there is less certainty and more inconvenience in reducing an obligation of this nature to a money valuation than there is in computing the amount due on an ordinary bond or note. Nevertheless it may be approximately done; and this is sufficient for all the purposes of substantial justice. Courts never refuse to redress an injury on account of the difficulty in estimating the extent of the injury in dollars and cents.

In this case the age, health, general condition and expectation of life of Sarah A. Bostwick must be known; add to these the probable cost of supporting her for one year, and we have the data for a reasonable estimate of the cost of supporting her through life. It is a problem of the same nature, containing the same elements and similar factors, with the problem which the parties solved fourteen years ago. They then, as it seems, fixed the outside limit at \$900. The same thing can be done now as well as then. Possibly \$900 may be considered an equitable limit beyond which the plaintiff may not claim in this case. As other circumstances may exist which will materially affect the general question we will not consider the question further on this demurrer.

Regarding the conveyance as a mortgage, as we do, there is no foundation for the claim that an entry for a breach of the condition is essential. An entry is essential when the grantor would divest the grantee of his title for a breach of a condition. This is an action by the grantee, in whom the title is, not to enforce a forfeiture, but to foreclose an equity of redemption, unless the grantor, within a reasonable time allowed him therefor, pays the damage sustained by a breach of his agreement.

The Court of Common Pleas is advised to overrule the demurrer.¹

¹ In *Henley v. Hotelling*, 41 Cal. 22 (1871), RHODES, C. J., said: "A mortgage is a security for the performance of an agreement, which is usually to pay a sum of money. Leaving out of view other agreements than those for the payment of money, it is essential that there be

an agreement, either express or implied, on the part of the mortgagor, or some one in whose behalf he executes the mortgage, to pay to the mortgagee a sum of money. If there is no debt there is no mortgage."

Cf. *Flagg v. Mann*, 2 Sumn. 486 (1837), per STORY, J.

CHAPTER III. (*Continued*)

SECTION II.—ILLEGAL OBLIGATIONS

W—— *v.* B——

B—— *v.* W——

THE ROLLS COURT, CHANCERY, 1863

(32 *Beav.* 574)

THE MASTER OF THE ROLLS (SIR JOHN ROMILLY).¹

This is a case which has caused me considerable pain; but I can state very shortly why I think that this deed cannot be supported.

There are two suits, one to enforce a deed of the 20th of August, 1855, by which, in consideration of 1700*l.* lent by the defendant, Mr. W. to Mr. B., Mr. B. and his five children (two only of whom were adult) covenanted to surrender copyholds for securing that amount. The second suit is instituted by B. and his two daughters to set that deed aside.

The case is a very painful one in this respect: It appears that Mr. W. seduced C., one of Mr. B's daughters, and that in June, 1855, Mr. T., a brother-in-law of Mr. B., had pointed out to him the attentions paid to his daughter by Mr. W., that it was a matter of notoriety in the town in which they resided, and that it was essential to put a stop to it. At the same time, Mr. T. told him he should require the money due to him to be repaid, which consisted of 1100*l.*, and two sums of 300*l.* each for which he was surety. When T. required the money to be repaid, Mr. B. applied to Mr. W. for an advance. A day or two after, in June, 1855, in consequence of the strong remonstrances of Mr. T. and of Mrs. T., who was the aunt of this young lady, Mr. B. wrote a letter to Mr. W., in which he told him, that in consequence of the report, he must discontinue his visits to his house. In answer to this, Mr. W. wrote that there was no truth in the suggestion, but that he acquiesced in the propriety of the refusal to allow a continuance of

¹ The statement of facts and a portion of the opinion are omitted.

his visits. On the following day after writing this letter, Mr. W. wrote to Mr. B. and told him that he would advance the money required by Mr. B., and a treaty took place, and it was arranged that the advance should be made, and it was effected on the 20th of August, 1855, about two months after.

It is impossible to read the letters and the evidence in this case, and not come to the conclusion, that a part of the consideration for the advance of the money by Mr. W. and for the security which was given, was a promise that W. should be at liberty to continue his visits to the daughter. It is impossible that the father should not have been aware, after all the representations made to him by Mr. T. and by the public talk, that Mr. W. had, at that time, actually succeeded in seducing, or that he was attempting to seduce, his daughter. It is impossible to doubt the fact that the money was given in order that Mr. W. should be allowed to continue his attentions to the daughter, whether successful or not.

I am of opinion, in that state of the evidence, that no person can come into a Court of Equity and ask that effect should be given to a deed, the consideration for which was of that character. The Court is compelled to look at the whole of the consideration, and cannot execute the deed in part. And I am of opinion that no person can, on such evidence and facts as are here established, require this Court to give any assistance to either party concerned in such a transaction.

It occurred to me that I could leave the matter there, but, observing that others besides the parties to the corrupt bargain are affected by this deed, I am of opinion that I ought not. I am also influenced by this consideration, that, upon an action on the deed, the same defense would be open at law, and I think that I should not act properly, if I did not, as far as I am able, put an end to this painful case. Without saying anything as to what might be done in an action at law to recover the money lent, I shall order the deed to be delivered up to be cancelled.

The grounds on which I decide this case make it unnecessary for me to enter into the consideration whether proper protection was afforded to the two young ladies in this matter; but it would be difficult to see how either of these deeds of 1853 and 1855 could be supported in this Court as against them.¹

¹ Cf. *Whaley v. Norton*, 1 Vern. 483 (1687); *Rider v. Kidder*, 10 Ves. 360, 366 (1805).

BOSANQUETT v. DASHWOOD

COURT OF CHANCERY, 1735

(Cas. temp. Talb. 38)

THE plaintiffs being Assignees under a Commission of Bankruptcy against the two Cottons, brought their Bill against Dashwood the Defendant, as Executor of Sir Samuel Dashwood, who had in his Life-time lent several Sums to the Cottons, the Bankrupts, upon Bonds bearing 6l. *per Cent.* Interest; and had taken Advantage of their necessitous Circumstances, and compelled them to pay at the Rate of 10l. *per Cent.* to which they submitted, and enter'd into other Agreements for that Purpose; and so continued paying 10l. *per Cent.* from the Year 1710, to the Year 1724.

'Twas decreed at the Rolls that the Defendant should account; and that for what had been really lent legal Interest should be computed and allowed; and what had been paid over and above legal Interest should be deducted out of the Principal at the Time paid; and the Plaintiffs to pay what should be due on the Account: And if the Testator had received more than was due with legal Interest, that was to be refunded by the Defendant, and the Bonds to be delivered up.

Mr. Solicitor General and Mr. Fazakerley insisted for the Defendant, That 'twas hard to inquire into a Transaction of so long standing, the Parties having on all sides submitted to the Agreement, and that *Volenti non fit Injuria*; which was the Reason of the Lord Holt's opinion in the Case of *Tomkins versus Barnet*, 1 Salk. 22. why an action would not lie for Recovery of Money paid upon an usurious Contract; and that the Bankrupts being *Participes Criminis*, should have no more Advantage here than at Law. Nothing was more common than to admit the Party, after he had paid the Money, to be an Evidence in an Information upon the Statute of Usury; which shews he is, in the Eye of the Law, after Payment, an indifferent Person; And compared it to the Case of Gaming; where, if the Loser pays the Money, and does not sue for the Recovery within the Time prescribed by the Act, he is barred And cited the case of *Walker versus Penry*, 2 Vern. 78, 145

LORD CHANCELLOR [TALBOT]. There is no Doubt of the Bonds and Contracts therein being good: But it is the subsequent Agreement upon which the Question arises. It is clear that more has

been paid than legal Interest. That appears from the several Letters which have been read, which prove an Agreement to pay 10*l. per Cent.* and from Sir Samuel Dashwood's Receipts; but whether the Plaintiffs be intitled to any Relief in Equity, the Money being paid, and those Payments agreed to be continued, by several Letters from the Cottons to Sir Samuel Dashwood, wherein are Promises to pay off the Residue, is now the Question?

The only Case that has been cited, that seems to come up to this, is that of *Tomkins versus Barnet*; which proves only, that where the Party has paid a Sum upon an illegal Contract, he shall not recover it on an Action brought by him. And tho' a Court of Equity will not differ from the Courts of Law in the Exposition of Statutes; yet does it often vary in the Remedies given, and in the Manner of applying them.

The Penalties, for Instance, given by this Act, are not to be sued for here; nor could this Court decree them. And though no *indebitatus assumpsit* will lie, in Strictness of Law, for receiving of Money paid upon an usurious Contract; yet that is no Rule to this Court, which will never see a Creditor running away with an exorbitant Interest beyond what the Law allows, though the Money has been paid, without relieving the Party injured. The Case of Sir Thomas Meers, heard by the Lord Harcourt, is an Authority in Point, that this Court will relieve in Cases which (though perhaps strictly legal) bear hard upon one Party. The case was this: Sir Thomas Meers had in some Mortgages inserted a Covenant, That if the Interest was not paid punctually at the Day, it should from that Time, and so from Time to Time, be turned into Principal, and bear Interest: Upon a Bill filed, the Lord Chancellor relieved the Mortgagors against this Covenant, as unjust and oppressive. So likewise is the Case of Broadway, which was first heard at the Rolls, and then affirm'd by the Lord King, an express Authority, that in Matters within the Jurisdiction of this Court it will relieve, though nothing appears which, strictly speaking, may be called illegal. The Reason is; because all those Cases carry somewhat of Fraud with them. I do not mean such a Fraud as is properly Deceit; but such Proceedings as lay a particular Burden or Hardship upon any Man: It being the Business of this Court to relieve against all Offences against the Law of Nature and Reason: And if it be so in Cases which, strictly speaking, may be called legal, how much more shall it be so, where the Covenant or Agreement is against an express Law (as in this Case) against the Statute of Usury, though the Party may have submitted for a Time to the Terms imposed on

him? The Payment of the Money will not alter the Case in a Court of Equity; for, it ought not to have been paid: And the Maxim of *Volenti non fit Injuria* will hold as well in all Cases of hard Bargains, against which the Court relieves, as in this. It is only the Corruption of the Person making such Bargains that is to be considered: It is that only which the *Statute* has in View; and 'tis that only which intitles the Party oppressed to Relief. This answers the Objection that was made by the Defendant's Counsel, of the Bankrupts being *Participes Criminis*; for, they are oppressed, and their Necessities obliged them to submit to those Terms. Nor can it be said in any Case of Oppression, that the Party oppressed is *Particeps Criminis*; since it is that very Hardship which he labours under, and which is imposed on him by another, that makes the Crime. The case of Gamesters, to which this has been compared, is no way parallel; for, there both Parties are Criminal: And if two Persons will sit down, and endeavour to ruin one another, and one pays the Money, if after Payment he cannot recover it at Law, I do not see that a Court of Equity has anything to do but to stand *Neuter*; there being in that Case no Oppression upon one Party, as there is in this.¹ Another Difficulty was made as to the Refunding: But is not that a common Direction in all Cases where Securities are sought to be redeemed, that if the Party has been over-paid, he shall refund? Must he keep Money that he has no Right to, merely because he got it into his Hands? I do not determine how it would be if all the Securities were delivered up; that is not now before me: I only determine what is now before the Court; and is the common Direction in all Cases where Securities are sought to be redeemed.

And so affirmed the Decree, &c.

¹ "In cases where agreements or other transactions are repudiated on account of their being against public policy, the circumstance that the relief is asked by a party who is, perhaps, *particeps criminis* is not in equity material. The reason is that

the public interest requires that relief should be given, and it is given to the public through the party (Story, Eq., § 208)." — *Per* ENGLISH Ch. J., in *Breathwit v. Rogers*, 32 Ark. 758 (1878).

FANNING *v.* DUNHAM

COURT OF CHANCERY OF NEW YORK, 1821

(5 *Johns. Ch.* 122)

BILL in equity. Plaintiff sought cancellation of a mortgage and also an injunction against the defendant from proceeding at law on the mortgage or selling under it. It appeared that defendant was about to foreclose the mortgage by virtue of a power of sale contained therein. Plaintiff claimed that the notes and mortgage were made and delivered upon usurious consideration. On this point a feigned issue was tried and the jury found in favor of plaintiff.¹

THE CHANCELLOR [KENT]. If the defendant was endeavoring to enforce any of his securities in this Court, and the present plaintiff had set up and made out the usury, by way of defense, the remedy would have been obvious. The securities would have been declared void, and ordered to be delivered up and cancelled. But the defendant has not resorted to this Court. He has caused a judgment to be entered up at law, upon the warrant of attorney given by the plaintiff; and the Supreme Court have ultimately refused to afford any relief to the plaintiff against that judgment, though that Court awarded a feigned issue, and had the usury in the bond upon which the judgment was entered, established by the verdict of a jury. The defendant has also proceeded to foreclose the mortgage, not by the aid of this Court, but by advertising under a power contained in the mortgage, and it is the present plaintiff who is compelled to come here and ask for relief, which he cannot obtain elsewhere, against the judgment at law and other legal securities infected with usury, by means of the original transactions and responsibilities which they were intended to cover.

The question now is, upon what terms he can have relief?

With respect to the relief that can be afforded here, I take the rule to be, that a plaintiff who comes to a Court of Equity for relief against a judgment at law, or other legal security, on the ground of usury, cannot be relieved, except upon the reasonable terms of paying to the defendant what is really and *bona fide* due to him. On the other hand, if the party claiming under such usurious judgment, or other security, resorts to this Court to render his claim

¹ Statement of facts abridged. Portion of opinion omitted.

available, and the defendant sets up and establishes the charge of usury, the Court will decide according to the letter of the statute, and deny all assistance, and set aside every security and instrument whatsoever, infected with usury. It is perfectly immaterial, in respect to the application of the principle to the case of the debtor who sues here, whether the usury be confessed by the defendant in his answer, or be made out by proof. The plaintiff must still consent to do what is just and equitable on his part, or the Court will not assist him, but leave him to make his defense at law as well as he can.

The equity cases speak one uniform language; and I do not know of a case in which relief has ever been afforded to a plaintiff, seeking relief against usury, by bill, upon any other terms. It is the fundamental doctrine of the Court. Lord Hardwicke, 1 Vesey, 320, said that in case of usury equity suffers the party to the illicit contract to have relief, but whoever brings a bill, in case of usury, must submit to pay principal and interest due. Lord Eldon, 3 Ves. & Bea. 14, after an interval of more than sixty years, declared precisely the same rule. At law, says he, you must make out the charge of usury, and at equity you cannot come for relief without offering to pay what is really due; and you must either prove the usury by legal evidence, or have the confession of the party. In *Eagleson v. Shotwell*, 1 Johns. Ch. Rep. 536, the same rule was followed in this Court, where a party came to be relieved against usury in a mortgage.

I have been thus particular in showing the rule of equity on this subject, because the plaintiff has sought by his bill to have all the securities taken by the defendant, and infected with usury, declared void, and ordered to be cancelled, without offering to pay anything. His counsel have also contended, at the hearing, that the rule in equity, where the defendant either confesses the usury or it is established by testimony, is the same as it is when usury is set up as a defense to a demand in law or equity. All that I can do in this case, consistently with my view of the established doctrine of the Court, is to direct an account to be taken of the dealings between the parties, and to hold the securities which the defendant has taken to be good only for the balance which may appear to be due to the defendant, after deducting all usurious excess in any of his commissions and charges.¹

¹ This represents the general view 186 [1864]). For the rule applied in (*Heacock v. Swartwout*, 28 Ill. 291 cases where the mortgagor is defendant, see *Kuhner v. Butler*, 11 Ia. [1862]; *Sulphen v. Cushman*, 35 Ill.

WILLIAMS v. FITZHUGH

COURT OF APPEALS OF NEW YORK, 1868

(37 N. Y. 444)

THE plaintiff sought in this action a judgment declaring certain six notes (made by the plaintiff and given to the appellants' testator, two dated April 3, 1854, for \$5000 each, and four dated July 6, and July 1, 1854, for \$5000, \$6000, \$6000, \$4000, respectively), amounting in the aggregate to \$31,000, and a mortgage upon land in Ohio, given by the plaintiff to secure the payment of the six notes, void for usury, and adjudging and decreeing that they be given up, cancelled and discharged, and forbidding the prosecution of an action already commenced in one of the courts of Ohio, upon two of those notes, or any other action upon any of the said notes, or the said mortgage. The original defendant, Allen Ayrault, having died pending the action, the action was revived against the respondents, his executors.

The action was tried at Special Term in the Supreme Court, and to sustain the action the plaintiff produced a record of judgment which set forth the alleged transactions, in which the notes were given, and by which one of the notes dated in July was adjudged void for usury, and upon the evidence contained in the record the judge, at Special Term, found that all of the six notes were so void, and a judgment was rendered declaring the notes and the mortgage to be void for usury, and requiring that the respondents deliver up the notes and mortgage to the plaintiff to be cancelled, and execute a discharge of the mortgage in such form that it may be

419 (1860); *Union Bank v. Bell*, 14 Oh. St. 200 (1863); *Snyder v. Griswold*, 37 Ill. 216 (1865). Compare *Hunt v. Acre*, 28 Ala. (N. S.) 580 (1856).

Where, in an action to foreclose a mortgage owned by a trust estate, it appears that one of the trustees received a usurious bonus, the mortgage is not avoided thereby, unless it be shown that the bonus was received by the authority or with the knowledge of the other trustees. *Van Wyck v. Walters*, 16 Hun, 209, affirmed 81 N. Y. 352 (1878).

The holding is similar in cases where the bonus is secretly taken by an agent. Thus, where the lender has received a security providing for payment of the precise amount loaned by him with lawful interest, the fact that his agent without his authority, knowledge or participation, had extorted from the borrower a sum of money upon the false pretense that it was a bonus for his principal, does not taint the security with usury. *Estes v. Purdy*, 66 N. Y. 446 (1876).

recorded in Ohio, so that it may be discharged of record and cease to be a lien upon the real estate described in it, and further enjoining the prosecution of an action (found to be pending) on some of the notes in one of the courts of Ohio, and awarding to the plaintiff his costs.

On appeal to the General Term, the Supreme Court modified the judgment so as to except from the operation thereof the two notes for \$5000 each, dated April 3, 1854, on the ground that the before-mentioned record did not necessarily decide that those two notes were usurious, and they adjudged that in all other respects the said judgment be affirmed. The executors (defendants below) appealed to this court.

WOODRUFF, J. The principal question which was discussed on this appeal, and which includes nearly all of the subordinate questions raised, is, will the courts of this State entertain a bill to declare void and compel the cancellation of a mortgage of lands lying in another State and executed there in pursuance of a contract entered into in this State to secure loans made and payable in this State, some of which loans are usurious and void by our laws?

This question may be intelligibly discussed by inquiring—first, would such a bill be entertained under the same circumstances if the lands were situated in this State? second, how is the question affected by the location of the lands without our jurisdiction? and, third, should the court require the surrender and discharge of such a mortgage without the payment of the loans which are not found to be usurious?

First, then, suppose the lands were situated in this State.

1st. It cannot be denied, indeed I do not understand the counsel for the appellant to question, that such a mortgage is void by the law of the State of New York. Our statute declares that "all . . . assurances, conveyances, all other contracts or securities . . . whereby there shall be reserved, or taken, or *secured*, or agreed to be reserved or taken," any greater sum or value for the loan or forbearance of money, than at the rate of seven per cent. per annum, "shall be void." The proposition is, that a security given to secure the payment of money is void if it be given to secure a usurious loan, and if it be so given, the fact that it was also given to secure loans which were not usurious, will not preserve it from entire condemnation. If void in part, it is void altogether.

The late learned Chief Justice Jones, in *The Fulton Bank v. Benedict* (1 Hall S. C. 480, 546), thus states the proposition: "It is well settled that if any part of the loan or debt for which the note

or security was given is usurious, the security is void;" referring, among other cases, to *Harrison v. Harmel*, 5 Taunt. 780.

In *Jackson v. Packard*, 6 Wend. 415, it is held that a mortgage, given to secure a sum of money, consisting of one loan made prior thereto, which is usurious, and another which is free from usury, is void. "If a mortgage or other security is given for two or more antecedent loans, either of which was infected with usury, the whole security is void." That under the statute "there is no such thing as such an instrument being void in part and good for the residue; the taint of usury destroys the whole security." The debt which was free from usury may be recovered, but the mortgage is void (*Rice v. Welling*, 5 Wend. 595). And in *Hammond v. Hopping*, 13 Wend. 505, the same doctrine is re-asserted in reference to contracts generally. "The statute against usury renders any contract infected with it, utterly void; but if the usurious security was given in part for a pre-existing valid debt, that debt is not destroyed by the illegal security." These decisions have stood as the law of this State for more than thirty years, and I am not aware that their correctness has been questioned in any of our courts.

2d. If, then, the mortgaged premises were in this State, have our courts jurisdiction to decree that the mortgage be given up and cancelled, and is it error, upon the facts assumed, to do so? The statute is:

"§ 13. Whenever any borrower of money . . . shall file a bill in chancery for relief or discovery against any violation of the provisions of . . . this act, it shall not be necessary for him to pay, or offer to pay, any interest or principal on the sum or thing loaned, nor shall any court of chancery require or compel the payment . . . of the principal sum, or interest or any part thereof, as a condition of granting relief.

"§ 14. Whenever it shall satisfactorily appear, by the admission of the defendant, or by proof, that any . . . assurance, pledge, conveyance, contract, security . . . has been taken or received in violation of the provisions of this act, the Court of Chancery shall declare the same to be void, and enjoin any prosecution thereon, and order the same to be surrendered and cancelled."

This language, taken literally, seemed, not only to confer jurisdiction, but absolutely to require the Court of Chancery to decree the surrender and cancellation of securities infected with usury, of whatever description, whenever the borrower saw fit to invoke the interposition of the court, without the aid of any other ground for

coming into that tribunal than the fact of usury. But the chancellor, in *Perrine v. Striker*, 7 Paige, 598, held, that where the party had a full and complete remedy at law, he could not come into the Court of Chancery for relief; that this statute was not intended "to compel the Court of Chancery to take jurisdiction of every question of usury, although a perfect remedy, both as to discovery and relief, could be had in a court of law." Hence, when the parties to a note not negotiable sought a discovery and perpetual injunction against a suit thereon (although the statute authorized the examination of the plaintiff in the suit at law on the trial) on the ground that it was usurious, the bill was dismissed because the remedy was complete at law. But here cognized the jurisdiction and the propriety of its exercise, when there were any special circumstances which made the remedy at law ineffectual or incomplete.

In *Morse v. Hovey*, 9 Paige, 197, on dismissing the bill, the chancellor affirms the decision in *Perrine v. Striker*, and expounds it more fully, thus: "The legislature did not intend to transfer to this court concurrent jurisdiction with courts of law in every case of a usurious contract; but merely to give to this court the power to exercise its jurisdiction in those cases where it was necessary to aid the defense of usury; or to remove *usurious securities which were a cloud upon the complainant's title* to real property, or which might be used at law to his injury in such a manner that he could not interpose a legal defense to a suit on them in a court of law. Here the note is *negotiable*, so that it may be sued in the name of a third person; and if the bill had contained the allegation that the usury could only be proved by the oath of the defendant, it might possibly have presented a case for the interference of this court."

Conceding that this relaxation of the stringent and imperative language of the statute is reasonable, no construction of the statute has gone further.

Accordingly, bills by borrowers to remove usurious securities, which are a cloud upon the complainant's title to real property, have uniformly been entertained. (See *Cole v. Savage*, 10 Paige, 583, questioned, without impeaching the general doctrine, in *Post v. Bank of Utica*, 7 Hill, 391; *Peters v. Mortimer*, 4 Edw. Ch. 279; *Pearsall v. Kingsland*, 3 *id.* 195; *Dry-Dock Company v. American Life Insurance and Trust Company*, 3 Comst. 361; *Schermerhorn v. Talman*, 14 N. Y. 93; *Manice v. Dry-Dock Company*, 3 Edw. 143.)

It is no answer to such a bill that the mortgagor has a good es-

fense to a bill for the foreclosure of the mortgage. It is an apparent incumbrance on the land, Its invalidity depends upon extrinsic facts. The doctrine of *Cox v. Clift*, 2 N. Y. 123, cited by the appellant, that the complainant has a perfect legal defense against it (when a right under it is asserted), "written down in the title-deed," has no application to it; and *Ward v. Dewey*, 16 N. Y. 519, was decided on like grounds. The mortgage is an impediment to a sale of the land for its value. The mortgagor is not bound to wait until the mortgagee attempts a foreclosure, not only for these reasons, but because in the meantime it may become impossible to prove his defense. If this be so, then, if the lands mortgaged were situated in this State, the mortgage in question was wholly void, and there is sufficient ground for invoking the interposition of the court to decree that such a mortgage be surrendered and cancelled or discharged. Whether it should be so discharged without the payment of that portion of the debt which has not been adjudged to be usurious, and which, for the purposes of this appeal, is to be deemed both legally and equitably due, will be presently considered.

Second, how, then, is the question affected by the circumstance that the mortgaged premises are situated in the State of Ohio, where the mortgage was executed?

The mere circumstance that the land is in another State can, upon no principle that I can discover, furnish a reason for denying the jurisdiction of our courts, or for questioning the propriety of its exercise.¹ . . .

Third, does it follow that the decree in this action, so far as it directed the surrender and discharge of the mortgage, was warranted by well-established rules of equity applicable to the subject?

It is familiar doctrine in courts of equity that "he who seeks equity must do equity," and without that the court of equity will not extend its arm for the relief of the suitor. If he can protect himself, either in whole or in part at law, if he can defend when assailed, very well; he can decline any concession of the equitable rights of the adverse claimant and stand upon his legal position, it may be safe, or it may be in peril, but if he invoke equitable interposition he must come with clean hands and prepared to do whatever in the judgment of equity is fair and equitable to his adversary; else, the court will not entertain him, but will answer, "Stand upon your legal rights, or come here and perform the just condition of equitable relief."

¹ The discussion of this point is omitted.

It cannot be doubted, therefore, that when a party comes into a court of equity to remove a cloud upon the title to his land, he must do whatever it is equitable that he should do, before the court will interfere. In that respect he stands in no other or better condition than he who comes to compel the specific performance of a contract to convey: he must come prepared to pay and perform all that by the conditions of the contract he was bound to pay or perform,—or than he who comes to set aside a conveyance obtained from him by fraud: he must come prepared to restore all that he has received as the consideration of such conveyance.

And, on precisely the same ground, it was the well-settled rule of courts of equity that he who came into that court to set aside a conveyance or other security as void, because given to secure a usurious loan, must come prepared to pay so much as he had in fact received. He might stand on his legal rights and defend any and every endeavor to compel him to pay, but if he invoked the aid of a court of equity to give him affirmative relief that court recognized his equitable obligation to refund what he had received (*Rogers v. Rathbun*, 1 Johns. Ch. 367; *Tupper v. Powell*, *id.* 439; *Fanning v. Dunham*, 5 *id.* 122, 137; *Morgan v. Schermerhorn*, 1 Paige, 544; *Fulton Bank v. Beach*, *id.* 429; *s. c.*, 3 Wend. 573; *Taylor et ux. v. Bell et al.*, 2 Vern. 170; *Whitman v. Francis*, 8 Price, 616).

On what ground is the plaintiff in this case entitled to have his mortgage set aside without qualification or condition?

The notes which he had given to secure a usurious debt are declared void, and ordered given up to be cancelled. He cannot be prosecuted upon his mortgage in any form in this State, because by law it is void. If he has need of further equitable interference, it is because the mortgage is an apparent lien, a cloud upon the title to his lands, and he should be relieved therefrom.

Why, then, if he asks further equitable relief, and invokes the further interposition of a court of equity therefor, should he not do equity? Why should he not pay to the defendants what he in fact received?

The answer, and the only answer which is or can be suggested, is that our statute declares (Laws of 1837, c. 430, § 4), that whenever any borrower of money, goods or things in action, shall file a bill in chancery for relief or discovery, or both, against any violation of the provisions of the title of the Statutes, concerning the interest of money, "or of this act, it shall not be necessary for him to pay, or offer to pay, any interest or *principal* on the sum or

thing loaned, nor shall any court of chancery require or compel the payment or deposit of *the principal sum or interest*, or any portion thereof, as a condition of granting relief, or compelling or discovering to the borrower, in any case, *usurious loans* forbidden by the said title or this act." This section of the act of 1837 was passed to extend the previous title, so that it should embrace cases in which the court was applied to for discovery, as well as cases in which relief alone was sought, and to relieve him from paying any part of the principal or interest in either case, and it should therefore be read and construed in connection with such previous law, which is as follows (1 Rev. Stat., p. 772, § 8): "Whenever any borrower of any money, goods or things in action, shall file a bill in chancery for a discovery of *the money, goods or things in action taken or received in violation of either of the foregoing provisions*, it shall not be necessary for him to pay, or offer to pay, any *interest whatever on the sum or thing loaned*, nor shall any court of equity require or compel the payment or deposit of *the principal* or any part thereof, as a condition of granting relief to the borrower in any case of a usurious loan, forbidden by this chapter." (See *Livingston v. Harris*, 3 Paige, 528; same case on appeal, 11 Wend. 324; see the history of this legislation in *Post v. Bank of Utica*, 2 Comst. 391 *et seq.*)¹

What in these statutes is the principal sum or interest which the borrower shall not be required to pay? Is it not the "usurious loan" and the interest thereon? Is it not *the money, goods or things in action*, taken or received in violation of the provisions of the act? Most clearly that, and only that. It does not contemplate, it is true, the existence of any other equitable condition, but it by no means requires that any other condition should be waived.

The subject dealt with is a loan upon usury; it designs that there shall be no means, direct or indirect, in which the payment of such a loan, or any interest thereon, shall be compelled either by

¹ X executed and delivered a mortgage to Y in the sum of \$10,000 which was usurious in that X received from Y but \$8,000. After paying the interest on the mortgage for some years, X died, leaving a will whereby he devised the mortgaged lands to Z. *Held*, Z cannot rid the land of the mortgage without paying or offering to pay the sum actually loaned,

since Z is not a "borrower" within the meaning of the provisions of the Usury Law of 1837, declaring such payment or offer to be unnecessary as a condition of granting relief to a "borrower." *Buckingham v. Corning*, 91 N. Y. 525 (1883).

See, also, *Leavitt v. Enos*, 155 App. Div. (N. Y.) 584 (1913).

a court of law or equity. And relief against such payment accomplishes the end, so far as this statute directs relief to be given.

Hence the discovery spoken of, and authorized by the statute, is a discovery of *the money*, etc., taken or received in violation of the statute, and not money which, not being so received, the borrower is bound both at law and equity to repay. And it is *the principal* or interest on *the* sum loaned, *i. e.*, loaned in violation of the statute, the payment of which cannot be required as a condition of relief.

It follows that where a contract or obligation is given for two or more separate and independent things or objects, having no connection with each other, and one of those objects is the security of a usurious debt, although the contract or obligation is altogether void for reasons above given, and no action at law or elsewhere could be maintained thereon, nevertheless, if the party comes into a court of equity to ask that it be surrendered, all that the statutes of usury have done affecting the complainant's right to relief, is to forbid that any payment on account of such debt shall be made a condition of relief. As to other conditions, the statute is silent, and the court is left to administer relief upon those principles which govern the subject generally.

When, therefore, the plaintiff asks that a mortgage be cancelled as a cloud upon the title to his lands, and that a court of equity shall so direct, in virtue of its power and its disposition to enforce his equitable rights, the court may not require that he pay a usurious debt, or any part thereof, or any interest thereon, but it may require the performance of any other duty which is just to the adverse party, unembarrassed by the statutes in question.

In equity, the mortgagor in such case stands, in reference to debts not usurious secured by the mortgage, in the same attitude as a complainant seeking to redeem. He must pay what at law and in equity he owes. Nor is this any departure from the doctrine already stated, that the mortgage, being void in part, because given to secure a usurious debt, is void altogether.

Upon that doctrine, the plaintiff, if he see fit, may rely, and on that ground he may, if he can, defend himself and the title to his lands whenever and wherever assailed, but if he asks affirmative action and interference from a court of equity to set aside the mortgage and adjudge its surrender, he must do equity by paying his just debt, not impeached for usury.

The most that the court below should have done, was to adjudge that so much of the apparent debt as was secured by the four notes

dated in July, 1854, proved and adjudged (by the decree as modified by the General Term of the Supreme Court) to be usurious, was void; that the said notes be surrendered to be cancelled, and that the defendants be enjoined against the prosecution of any suit upon those four notes.

The judgment should be modified to conform to these views without costs to either party on the appeal, and the judgment rendered at the Special Term, so far as it adjudged or decreed the surrender or discharge of the mortgage should be reversed, and so far as it awarded costs to the plaintiff, should be further reversed and modified so that neither party recover costs of the other in this action.

All the judges concurring.

*Judgment affirmed, with modification.*¹

STILLMAN v. LOONEY

SUPREME COURT OF TENNESSEE, 1866

(3 *Cold.* 20)

SHACKELFORD, J., delivered the opinion of the Court.

This bill was filed on the Chancery side of the Common Law and Chancery Court at Memphis, to foreclose a mortgage executed by the defendant, on three lots in the City of Memphis, which had been duly registered to secure the payment of two notes, of \$2500 each, dated July 22, 1862, due in twelve and twenty-four months from date, payable at the Union Bank, indorsed by Stillman & Beach. The answer of the defendant and the proof shows the consideration for which the notes were executed was Confederate Treasury notes. The Chancellor dismissed the bill; from which the complainant has appealed.

¹ In *Shaw v. Carpenter*, 54 Vt. 155 (1881), P sold C his entire business taking four notes secured by a mortgage. Part of the consideration for these four notes was illegal, consisting of spirituous liquors whose sale was forbidden by statute. A foreclosure suit was brought by S, a transferee in good faith and without notice. Held, by majority of court,

the mortgage could be foreclosed for that amount of the consideration which was valid, the mortgage being good up to the extent of the consideration which was legal. Ross, J., dissented on the ground that the contract was an entire one, and since part of the consideration was illegal the whole transaction should fall.

It is a well-settled principle in executing contracts, if the consideration is illegal and against public policy, the Court would not lend its active aid to enforce it. No rule of law is more clearly defined and settled than this, in the American and English Jurisprudence (3 Head. 297 and 723; 6 Bing. 174; 10 Bing. 110). This Court held in the case of *Overall v. Wright, deceased*, at Nashville, December Term, 1865, in manuscript, that an agreement to credit a payment in Confederate Treasury notes, for which Mr. Wurtz had given his receipt, and on the trial sought to have credited on the note, was no payment; that Confederate Treasury notes were issued for an unlawful purpose, and in violation of the laws of the State and Constitution of the United States, and that all contracts founded upon them were illegal, and could not be enforced through the Courts. In the case of *Craig v. The State of Missouri*, the Supreme Court of the United States held a promissory note given for certificates issued at the Loan Office of Chariton, Missouri, payable to the State of Missouri, under the Act of the Legislature establishing Loan Offices, was void (4 Peters, 410), the Act being in conflict with the Constitution of the United States.

In the case under consideration, the notes were issued by an unlawful confederation of States, whose declared purpose was to overthrow the Constitution. The enforcement of all such contracts is against public policy. The party seeking the aid of the Court will be repelled. The defendant, not out of any favor to him, but because he is such, can allege and show the illegality of the contract. That being made apparent, the legal consequences follow.

There is no error in the decree of the Chancellor, and the same is affirmed.¹

¹ *Accord, Drexler v. Tyrrell*, 15 Nev. 114 (1880); *Peed v. McKee*, 42 Ia. 689 (1876).

Action for foreclosure of a mortgage given to secure part of the purchase money of a house. The defense was that the house was purchased for use as a disorderly house. *Held*, for plaintiff, since the contract was executed. *Hager v. O'Neill*, 20 Ont. App. 198, affirmed 22 Can. Sup. 510 (1894). *Sed qu.*

A husband and wife entered into an agreement, without the intervention of a trustee, providing that

thereafter they should live separate and apart from each other and that the husband would pay the wife \$1,000 per year. Some time later the husband executed and delivered to S his bond for \$17,000 accompanied by mortgage, to secure said payments to his wife. Suit was brought for foreclosure of the mortgage. *Held*, for defendant, the husband, since the separation agreement, made without the intervention of a trustee, was void as against public policy being in the nature of a contract to alter or dissolve the marriage relation; hence, also, the

McLAUGHLIN *v.* COSGROVE

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1868

(99 *Mass.* 4)

WRIT of entry by the heir of a mortgagor of land against the mortgagee in possession after foreclosure. In the Superior Court, on agreed facts which are stated in the opinion, Reed, J., directed a verdict for the tenant, and reported the case.

CHAPMAN, J. The demandant admits that her ancestor, Daniel McLaughlin, gave the tenant two mortgages of the demanded premises; one dated April 25, 1855, and the other dated February 12, 1858; that the tenant entered for foreclosure on the 6th of March, 1863; and that the foreclosure was completed prior to the commencement of this action. But it appears that these mortgages were made to secure the payment of notes which were given in payment for intoxicating liquors illegally sold by the tenant to the mortgagor. By the statute then existing, these notes were void; and it is admitted that, if the mortgage had not been foreclosed, this action could not be maintained. For, as a security for a debt made illegal by statute, the mortgage could not be enforced against the demandant, who is the heir of the mortgagor. It is necessary, then, to consider the effect of the foreclosure.

A deed of mortgage conveys to the mortgagee the legal title to the land, subject to a condition. If the condition be performed according to its terms, the title of the mortgagee is thereby defeated. If not performed at the day, the legal estate remains in the mortgagee, and an equitable right to redeem by payment at a later day is all that remains in the mortgagor, unless he can show that the consideration was illegal, in which case he may defeat the mortgage altogether. But if the grantee enters for breach of the condition, and keeps possession till the right to redeem is foreclosed,

bond and mortgage transaction which was to secure it. *Boyd v. Boyd*, 130 App. Div. (N. Y.) 161 (1909).

A husband who was a defaulter, urged his wife to execute a mortgage on her land to secure the sureties on his bond telling her that rather than go to jail, he would commit

suicide. The wife finally executed the mortgage with much reluctance. The mortgagees had no knowledge of her hesitation, and they had not yet either threatened or commenced prosecution of her husband. *Held*, on foreclosure, the mortgage was valid. *Lefebvre v. Dutruil*, 51 Wis. 326, 8 N. W. 149 (1881).

he then has an absolute title; and the value of the land is applied, by operation of law, to the payment of the debt secured by the mortgage.

In a case like the present, it is as if the mortgagor had purchased the liquors, and paid for them by an absolute conveyance of the land. If, then, the demandant can recover, it must be on the ground that the property given in payment for liquors illegally sold can be recovered back. But such is not the law. Payments made for intoxicating liquors in money, labor or personal property, may be recovered back (Gen. Sts. c. 86, § 61; *Walan v. Kerby*, ante, 1). But the statute does not extend to payments made in real estate. The demandant has lost her claim to the land by not bringing her action till after the mortgage was foreclosed.¹

Judgment for the tenant on the verdict.

ATWOOD v. FISK

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1869

(101 Mass. 363)

Two bills in equity to compel the surrender or cancellation of two overdue promissory notes, dated in 1861, and signed by the plaintiffs respectively, with Joseph Atwood, each note for the payment by the promisors, jointly and severally, to the order of the defendants, of \$1340, in equal semi-annual instalments of \$67, with interest; and of two mortgages of real estate, containing the usual power of sale clauses, given by the plaintiffs, respectively, to the defendants, to secure the payment of the notes. The ground on which the bills were sought to be maintained was, that the consideration of the notes and mortgages was a promise of the defendants to the plaintiffs, to forbear to prosecute Joseph Atwood, who was a bookkeeper in the employ of the defendants, for embezzling money of his employers; that therefore the instruments were null and void; but, that so long as they remained outstanding, they constituted a cloud on the title of the plaintiffs in the real estate, and might be used to the injury of the plaintiffs at some future time when evidence of the illegality of their consideration should be lost. The answers denied the plaintiffs' allegations concerning the consideration for the instruments, and alleged a lawful consideration therefor. Issue was joined on the answers, and the

¹ *Accord, Sample v. Barnes*, 14 How. (U. S. Sup. Ct.) 70 (1852).

cases were reserved by Colt, J., on the bills, answers and evidence, for the determination of the full Court.

AMES, J. A note, given in consideration of a composition of felony, or of a promise not to prosecute for a crime of a lower degree than a felony, is illegal, and cannot be enforced by the promisee against the promisor. And it makes no difference that, of various elements making up the entire consideration, a part, and even the larger part, was legal and valid. If part of the consideration was illegal, the effect upon the note would be the same as if the whole were illegal. The plaintiffs insist that the notes referred to in their bills of complaint fall within this rule of law.

But it has also long been settled that the law will not aid either party to an illegal contract to enforce it against the other, neither will it relieve a party to such a contract who has actually fulfilled it, and who seeks to reclaim his money or whatever article of property he may have applied to such a purpose. The meaning of the familiar maxim, *in pari delicto potior est conditio defendentis*, is simply that the law leaves the parties exactly where they stand; not that it prefers the defendant to the plaintiff, but that it will not recognize a right of action, founded on the illegal contract, in favor of either party against the other. They must settle their own questions in such cases without the aid of the courts. In the somewhat quaint language of Lord Chief Justice Wilmot in *Collins v. Blantern*, 2 Wils. 350, "all writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again; you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back. *Procul, o procul este, profani!*" In this respect the rule in equity is the same as at law. Equity follows the rule of the law, and will not interfere for the benefit of one such party against a *particeps criminis*. The suppression of illegal contracts is far more likely in general to be accomplished, by leaving the parties without remedy against each other. And so the modern doctrine is established, that relief is not granted where both parties are truly *in pari delicto* (1 Story Eq., § 298; *Claridge v. Hoare*, 14 Ves. 59).

There is no reason why equity should be able to grant relief upon principles different from those recognized in courts of law. If the plaintiffs were occupying the position of defendants, and if the

cases before us were actions brought to recover the amount of the notes in question, they could avail themselves of the maxim above referred to by way of defense. But they do not stand in that position. They are themselves invoking the aid of the court in its equity jurisdiction, to relieve them from a contract which they allege to be illegal. They are actors, or plaintiffs, and apparently are in a position in which the maxim in question can be invoked and relied upon on the other side. If the notes were founded on an illegal consideration, why should the court lend its process to aid one party to the illegality, rather than the other? What superior equities, in that view of the case, have these plaintiffs over the defendants? We see no such inequality in position, or abuse of advantages, as to entitle them to the aid of the court on the ground of public policy. If there has been a composition of a felony, or a suppression of a criminal prosecution, the plaintiffs were parties to it as well as the defendants, and it may perhaps be argued that the plaintiffs have had the benefit of the alleged corrupt agreement, and are merely seeking to be relieved from its inconveniences. They are seeking not to get back money paid under an illegal contract, but to recall notes and securities which they have given under such a contract, a distinction which is too slight to make much difference in the substantial equities of the case (*Worcester v. Eaton*, 11 Mass. 375).

We see no occasion for the interference of the court, as prayed for, upon any view of the case. If the bookkeeper embezzled the funds of his employers, he not only committed a crime, but he also incurred a debt. This debt he was legally and morally bound to pay, and the defendants had a right to make use of all lawful and proper means to enforce its payment or to obtain security. The rule of the common law, that all civil remedies in favor of a party injured by a felony are either merged in the higher offense against public justice, or suspended until after the termination of a criminal prosecution against the offender, is no part of the law of Massachusetts (*Boston & Worcester Railroad Co. v. Dana*, 1 Gray, 83). The fact that the debt grew out of a breach of trust, and had its origin in fraud and criminality, is not a reason, as a matter of law, for bestowing upon the debtor any peculiar privileges or exemptions. If the suppression of a criminal prosecution was one of the considerations for the contracts made and securities given by the plaintiffs, they can avail themselves of that fact as a defense in any suit at law against them upon such contracts. They are in no danger of losing the benefit of that defense in consequence

of any transfer of the notes to a third person. Some of the instalments were overdue and unpaid, and for that reason no indorsee could so hold them as to deprive the plaintiffs of their defence. As to the exercise by the mortgagees of the power of sale given by the terms of the mortgages, it cannot be difficult for the plaintiffs to see that any purchaser at such sale should be fully notified (if notice should be thought necessary) of all grounds of objection to the notes and mortgages, and of their intention to contest any title which such purchaser shall venture to buy at the sale. It is well settled that all defenses (except the statute of limitations) that can be made against the notes, can also be made against the mortgages (*Vinton v. King*, 4 Allen, 562).

Whether the evidence reported can be said to prove the alleged illegality in the contract is a question which we have not found it necessary to decide, or even to consider. In any view that can be taken of that question, the plaintiffs are not in a position to claim the equitable relief prayed for; and therefore, in each case, the

*Bill is dismissed, with costs for the defendants.*¹

¹ *Accord*, *Patterson v. Donner*, 48 Cal. 369 (1874); *Albertson v. Loughlin*, 173 Pa. St. 529 (1896).

Cf. Raguet v. Roll, 7 Oh. Rep. 70 [429] (1836); *Cowles v. Raguet*, 14

Oh. Rep. 38 (1846); *McQuade v. Rosecrans*, 36 Oh. St. 442 (1881). *Pearce v. Wilson*, 111 Pa. St. 14 (1885) is *contra* to *Raguet v. Roll*, *supra*.

CHAPTER III. (*Continued*)

SECTION III.—FUTURE ADVANCES

PETTIBONE *v.* GRISWOLD

SUPREME COURT OF ERRORS OF CONNECTICUT, 1822

(4 *Conn.* 158)

THIS was a bill in chancery to foreclose the equity of redemption of the defendants in certain mortgaged premises. The bill stated, that on the 3d day of July, 1815, Giles Griswold, for the consideration of 4000 dollars, conveyed to the plaintiff's testator three pieces of land in Burlington, by a deed containing the usual covenants of seisin and warranty, to which there was a condition annexed, that if the said Giles Griswold, his executors, &c., should pay said grantee one note of even date therewith, executed to said grantee, for 4000 dollars, payable in six months, at the Hartford bank, and all other notes the said grantee might indorse, or give, for said Griswold, at the bank or elsewhere, and all receipts said Pettibone, deceased, might hold against the said Griswold, then said deed to be void; that before the execution of this deed, the plaintiff's testator, with Griswold, executed, for Griswold's benefit, two joint notes, one to Seth Cowles, dated the 19th of April, 1814, for 2173 dollars, 97 cents, payable in six years from the date thereof, with interest annually, and one to Elijah Cowles & Co. of the same date, for 296 dollars, 95 cents, payable in six years, with interest annually; for which Griswold gave his receipt to the plaintiff's testator, and agreed to exonerate and indemnify him against all claims and demands on account of said notes; that on the 19th of September, 1815, Griswold also received of the plaintiff's testator sundry notes of hand, amounting to 1148 dollars, 62 cents, dated the 21st of February, 1815, for which Griswold gave his receipt, promising to account with the plaintiff's testator on said joint note to Elijah Cowles & Co.; that the mortgaged premises have been levied upon, by several creditors of Griswold, and set off to them, respec-

tively, on execution; that Griswold had not paid and indemnified the plaintiff's testator for all the notes that he had indorsed or given for him; nor had Griswold paid all the receipts the plaintiff's testator held against him, but the notes given by the plaintiff's testator to Seth Cowles and Elijah Cowles & Co. remain entirely unpaid by Griswold, but have been principally satisfied by the plaintiff's testator, and his estate is liable for the residue, Griswold being a bankrupt; nor had Griswold ever paid and satisfied his receipt of the 9th of September, according to the tenor thereof, but the plaintiff now holds the same unsatisfied. There were other averments, on which no question arose.

To this bill the defendants demurred; and the case was reserved for the advice of all the judges.

HOSMER, Ch. J. The plaintiff has brought his bill to foreclose a mortgage, the condition of which is, to secure to the mortgagee the payment of a note accurately described, which, it is presumed, has been paid, as there is no allegation of non-payment; and likewise to secure, "all other notes the said grantee might indorse for or give for said Griswold, at the bank or elsewhere, and all receipts said Pettibone, deceased, might hold against said Griswold." The land mortgaged has been levied on, by executions against the mortgagor; and the controversy is between the mortgagee and the execution creditors.

The notes of hand given to Seth Cowles and Elijah Cowles and Co. were in existence at the date of the mortgage, and are not included in the condition. They might and ought to have been described, or embraced, by some intelligible description of them. But the expression, "all notes the said grantee might indorse for or give for said Griswold," manifestly refers to future contracts, and not to notes then existing. The receipt of the 19th of September, 1815, renders it necessary to proceed further in the discussion of this case, or the preceding observations would be conclusive on the whole controversy.

On the extent to which a mortgage may be taken, I shall not express a definite opinion, as the exigencies of the case do not require it. It undoubtedly may be for existing debts, existing liabilities and, perhaps, for debts to be contracted in future. But the *manner* in which it may be done, forms an important consideration. It is the policy of our laws, and experience has demonstrated the wisdom of it, that the title to real estate should be registered for the benefit, not of the parties, but of creditors and all others

interested. "All grants and mortgages of houses and lands shall be recorded at length by the town clerk; and no deed shall be accounted good and effectual to hold such houses and lands against any other person or persons but the grantor or grantors and their heirs only, unless recorded as aforesaid" (Stat. 302, § 9). It is the object of this law to prevent fraud and give security and stability to title. It results, unquestionably, that the condition of a mortgage deed must give reasonable notice of the incumbrances on the land mortgaged. A creditor is not obliged by law to make inquiry *in pais* concerning the liens on the property of his debtor; but on application to the record he may acquire all the information which his interest demands. At least, he must have the power of knowing from this source the subject-matter of the mortgage, that his investigation may be guided by something which will terminate in a certain result. And what is not of less importance, the incumbrance on the property must be so defined as to prevent the substitution of everything which a fraudulent grantor may devise to shield himself from the demands of his creditors.

The condition of the deed under discussion, is dangerously indefinite and is at war with the policy of the recording system. It embraces all future notes and receipts without the designation of any, and baffles the inquiry of creditors and others relative to the condition of the mortgaged estate. A condition to a deed made to secure all future supplies, debts and liabilities, of every possible nature and description, would not be more lax and indefinite. The creditor could know nothing from an examination of the record, and must be cast on his debtor for information, the very person who would be least inclined to give it: and successive obligations, fictitious or actual, might be made to lock up his land, in defiance of every claim against him.

I am well aware that absolute certainty is not always to be expected from an examination of the records of land titles; but there always may and ought to be a certain object after which suitable inquiries may be made. A mortgage may be given to indemnify a person from damages arising by reason of his having become the surety of another in the office of sheriff or collector; or as administrator on an estate. In all these cases an inquiring creditor cannot know from the town record the precise incumbrance; but he has notice of certain definite facts, which point to and guide him in the necessary investigation on the subject. Cases of this description must not be confounded with conditions to deeds, which

neither communicate any certain information nor designate any track in pursuance of which information may be obtained.

The other Judges were of the same opinion.

*Judgment to be entered for defendants.*¹

STOUGHTON v. PASCO

SUPREME COURT OF ERRORS OF CONNECTICUT, 1825

(5 Conn. 442)

THIS was a bill in chancery, brought by Stoughton, to redeem mortgaged premises.

The plaintiff and Jonathan Pasco were trustees of the goods and effects of one Stephen Heath, deceased, for the benefit of certain legatees, according to his last will and testament. The amount of the property in the hands of the trustees, in February, 1812, which had been inventoried, was, at the inventory price, 6501 dollars, 28 cents, and of property not inventoried, 302 dollars, 50 cents. On the 8th of February, 1823, Jonathan Pasco, as trustee as aforesaid, was justly indebted to the plaintiff in a large sum, the amount of which was, at that time, unascertained. To secure such sum, on the day last-mentioned, he executed a mortgage deed of the premises to the plaintiff, which was duly recorded, with a condition subjoined in these words: "If said Pasco shall pay to said Stoughton all monies in his hands belonging to the estate of Stephen Heath, deceased; and also deliver to said Stoughton all notes and other securities for money belonging to said estate in his hands; and shall, in all respects, render to said Stoughton a true account of all monies and securities for the payment of money belonging to said estate, within twenty days from this date; and shall pay to said Stoughton his the said Pasco's note of land, payable to said Stoughton, for the sum of 210 dollars, on demand, with interest, dated March 5th, 1814; then this deed to be void," &c. The court found, that there was due to the plaintiff from said Pasco for monies and effects in his hands of the estate of Stephen Heath, deceased, intended to have been secured by said mortgage deed, the

¹ *Accord*, *North v. Belden*, 13 Conn. 376 (1840); *Branhall v. Flood*, 41 Conn. 68 (1874); *Stearns v. Porter*, 46 Conn. 313 (1878); *Garber v. Henry*, 6 Watts, (Pa.), 57 (1837), *semble*;

Bullock v. Battenhausen, 108 Ill. 28 (1883). Compare *Bell v. Fleming's Exrs.*, 12 N. J. Eq. 1, 490 (1858, 1859).

sum of 3137 dollars, 85 cents; besides the amount of the note mentioned in the mortgage. By subsequent deeds, dated the 8th and 22d of February, 1823, and duly recorded, Jonathan Pasco mortgaged the premises to Ashna Pasco, after a computation between the said Jonathan and the plaintiff, ascertaining the debt due to the latter. Before the execution of these mortgages, and before the debts secured by them had accrued, Ashna Pasco had notice, by information from Jonathan, of such computation and settlement, and that the sum due to the plaintiff was more than 2800 dollars.

Jonathan and Ashna Pasco were made parties defendants to the bill. As against Jonathan the court decreed a foreclosure, but denied the relief sought against Ashna, considering the mortgage in question to be void in relation to him. To review this determination, the plaintiff procured the record to be transmitted to this Court, pursuant to the statute.

HOSMER, Ch. J. The general question in this case is whether the mortgage made by Jonathan Pasco to the plaintiff is void in respect of Ashna Pasco, a subsequent mortgagee, except as regards a small debt by promissory note.

The objection made, on the defendant's part, to the granting of the prayer of the plaintiff's bill, is founded on the law requiring the recording of deeds. It is insisted that the policy of the recording system will be violated by giving validity to a mortgage, containing, as the one in question is supposed to do, no reasonable certainty in the description of the debt intended to be secured. The determination of this Court in *Pettibone v. Griswold*, 4 Conn. Rep. 158, is principally relied on; and is claimed to sustain the defendant's objection.

There are two questions embraced in the present case. The first is, whether the demand of Stoughton is of such a nature as to authorize the mortgage security; and the second is, whether it is described with such reasonable certainty that, in respect of it, a subsequent mortgagee is legally affected with notice.

1. In *Pettibone v. Griswold*, before cited, it was said, that a mortgage may be taken "for existing debts, existing liabilities, and perhaps for debts to be contracted in future." The court has found, that Jonathan Pasco was justly indebted to the plaintiff, as trustee on Heath's estate, in the sum of 3137 dollars, 85 cents; and that this sum was intended to be secured by the mortgage deed to Stoughton. The precise sum of money due to the plaintiff had not been ascertained at the date of the mortgage; and hence the phrase-

ology of the condition, that if Jonathan Pasco should pay to Stoughton all the monies, and deliver to him all the securities for money in his hands, belonging to Heath's estate, and render a true account, the deed should be void. That Jonathan Pasco was under a legal obligation to do what he stipulated, and that, as to him, Stoughton had a just demand, to the extent of the stipulation, must be implied by every one who reads the above condition. It would not enter into the imagination of any one that the mortgage was for a sum of money not due; and that, contrary to common sense and universal usage, Pasco had made a pledge of his estate to secure to the plaintiff a mere gratuity. But this point need be pursued no further, as the court, in the decree passed, considered the mortgage valid as between the parties.

2. The question remains whether the demand of the plaintiff is described in the mortgage, with such reasonable certainty, as from the record to affect a subsequent mortgagee with notice.

Now, what would such person understand from reading the aforesaid condition? On the principle of constructive notice of the record, the subsequent mortgagee must be supposed to have read the deed with its condition; and hence the propriety of the proposed question. On such perusal, he must be presumed to know that the mortgage was for a debt in some manner resulting from the trust estate in the mortgagor's hands, due to the co-trustee, the plaintiff; that the precise amount, at the date of the mortgage, was not ascertained; that it embraced all the monies and securities of Heath, in the hands of Pasco; and that this person had bound himself to render a true account of his indebtedness. In addition to this, let it be remembered that Ashna Pasco, previous to the delivery of either deed to him, had information from his mortgagor that the account between Jonathan Pasco and Stoughton had been adjusted, and that the sum now claimed as a debt was acknowledged to be due.

That the condition of a mortgage deed must give *reasonable notice* of the incumbrance on the land mortgaged, is an established principle. This is the undoubted criterion, by which, in respect of third persons, the validity of the mortgage is to be tested. What, then, is reasonable notice? Is it requisite that the condition should be so completely certain, in every particular, as to preclude the necessity of all extraneous enquiry? Certainly not. It was adjudged in *Pettibone v. Griswold*, before cited, that a mortgage to indemnify a surety for the official good conduct of another is valid universally; and yet the event on which an indebtedness may

arise, as well as the amount, are utterly unforeseen and contingent. Without a specification of either of these facts, there exists that reasonable notice which, in favor of those who are not parties to the mortgage, the law demands. The object of the recording law is to prevent fraud on purchasers and creditors; and such facts must be reasonably notified as are sufficient for this purpose; but, as has been shewn, notice perfect and complete, without any enquiry *dehors* the record, is not required.

One head of presumptive notice is this: that the law imputes to the purchaser the knowledge of a fact, of which the exercise of common prudence and ordinary diligence must have apprized him. Hence it has become a principle in a court of equity, that the notice which presents a certain object, concerning which successful enquiries without unreasonable inconvenience may be made, is sufficient. In *Peters v. Goodrich*, 3 Conn. Rep. 150, the above principle was recognized and applied. Curtis executed a mortgage deed to Goodrich, which was duly recorded, with condition to indemnify him against a promissory note, of which the latter was an indorser. To foreclose the equity of redemption, a bill was brought by Goodrich, from which it appeared that the mortgage was variant from the note, both in respect of its date and of the person to whom it was payable. The defendant, who was a subsequent mortgagee, objected against the correction of these mistakes, upon the specific ground that the description in the mortgage deed must be precisely adhered to, pursuant to the supposed policy of the recording system. In the delivery of their opinion the court observed, that "as between the parties, it is unquestionably clear that the misconception of the date of the note and of the promise, admitted of correction, on the common principles applied in chancery in similar cases; and the second mortgagee had such constructive notice of the fact from the recorded deed as placed him in no better condition than the mortgagor. Whatever is sufficient to put a person on inquiry is considered in equity to convey notice; for the law imputes to a person the knowledge of a fact of which the exercise of common prudence and ordinary diligence must have apprized him. Had the second mortgagee applied to Goodrich for information, as it was his intention to represent the facts correctly, relative to the mistakes, he would have had a communication of all the knowledge he now possesses."

The same principle was recognized by the court in *Pettibone v. Griswold*, before cited. After having declared it to be the policy of our law that the title to real estate should be registered for the

benefit of creditors and all others interested, it was observed by the court: "That it is the object of this law" (the act requiring deeds to be recorded) "to prevent fraud, and give security and stability to title. It results, unquestionably, that the condition of a mortgage deed must give reasonable notice of the incumbrances on the land mortgaged. A creditor is not obliged by law to make enquiry *in pais* concerning the liens on the property of his debtor; but on application to the record, he may acquire all the information which his interest demands; at least, he must have the power of knowing from this source the subject-matter of the mortgage, that his investigation may be guided by something which will terminate in a certain result. And what is not of less importance, the incumbrance on the property must be so defined as to prevent the substitution of everything which a fraudulent grantor may devise to shield himself from the demands of his creditors." In the argument of this case it has been supposed that the court, in *Pettibone v. Griswold*, had required perfect and complete certainty in the condition of a mortgage, so far as relates to strangers to the transaction, and to such a degree as to preclude the necessity of any further enquiry. But the error is most obvious and resulted entirely from the construction of a single sentence in the opinion expressed, disjoined from all other parts of it; as if it had been declared in the form of an axiom, and were insulated and alone. I readily admit that the paragraph immediately succeeding the rule relative to notice, was not expressed with a precision that defies all criticism. Instead of the expression "concerning the liens," more correctly it should have been "concerning the existence of the liens." It was expected, however, to receive its construction as being the part of an entire subject, each sentence contributing something to the precise development of the court's opinion; in pursuance of the maxim, *Ex antecedentibus et consequentibus fit optima interpretatio*. More especially may it be demanded, that it be read with this qualification: "at least, he must have the power of knowing from this source," i. e., from the condition of the deed, "the subject-matter of the mortgage, that his investigation may be guided by something which will terminate in a certain result." It is extremely obvious that the case of *Pettibone v. Griswold* was not affected by the preceding principles; and this may account for their being perhaps more loosely expressed than they would have been, had a close application of them been required. The mortgage in that case embraced *all future notes and receipts*, without the designation of any, and supplied *neither information*,

nor the probable means of successful enquiry; and, as there was no imaginable check on the substitution of notes and receipts at pleasure, and without imitation of time, the policy of the recording system, if such mortgage were valid, would effectually be defeated. A condition to a deed made to secure all future supplies, debts and liabilities, would not be more dangerously lax and indefinite.

The principle contended for by the defendants is refuted by the case of *Peters v. Goodrich*, by the expressions already recited from *Pettibone v. Griswold*, and by other parts of the same case. The latter case requires that the record should contain sufficient information relative to the subject-matter of a mortgage to direct the enquirer to the necessary intelligence, and to prevent a debtor, by extreme indefiniteness and generality, from the substitution of every possible demand at his pleasure. "I am well aware" (said the Judge, when delivering the opinion of the court) "that absolute certainty is not to be expected from an examination of the records of land titles; but there always may and ought to be a *certain object* after which suitable enquiries may be made. A mortgage may be given to indemnify a person from damages arising by reason of his having become the surety of another, in the office of sheriff or collector, or as administrator on an estate. In all these cases an enquiring creditor cannot know from the record the precise incumbrance; but he has notice of certain definite facts, which *point to and guide in him* the necessary investigation on the subject. Cases of this description must not be confounded with conditions to deeds which neither communicate any certain information nor *designate any track*, in pursuance of which information may be obtained."

In the transaction of business, the exigencies of it not unfrequently require that the conditions of mortgage deeds should be as uncertain as the one under discussion; and such mortgages are unquestionably legal. Both private justice and the convenience of the public demand that they should be considered valid. The case of mortgages for the indemnity of sureties, has already been mentioned. A mortgage to secure an unliquidated book debt, or the fidelity of a factor or bailiff, whose business it is to receive money and pay it over, undoubtedly would be good; and yet there is nothing certain here but the subject-matter of the stipulation.

What, then, is the fatal uncertainty existing in the description of the debt and obligation of Jonathan Pasco? The sum of the indebtedness was not, and could not be, specified; nor was it necessary that it should be; but the subject-matter of the mortgage was

explicitly stated. The subsequent mortgagee had notice from the record that Jonathan Pasco was indebted; and that he was accountable to the plaintiff for all the monies, and securities for money, of Heath. What the original amount was, the inventory of Heath's estate would inform him; and he would have experienced no difficulty in ascertaining the precise sum and manner of Jonathan Pasco's indebtedness. He was informed, by the mouth of his mortgagor, that a settlement had been made between him and the plaintiff; and that the balance due surmounted twenty-eight hundred dollars. Instead of effectuating the policy of the recording system by an invalidation of the plaintiff's mortgage, the court would, in that event, be instrumental in the perpetration of a hardship most inequitable. The free use and disposal of a person's property, where neither law nor policy forbids, would be inhibited; the exigencies of business, in promotion of the general convenience, disregarded; and the impracticable principle, in all cases, that mortgage conditions must contain within themselves, not reasonable certainty only, but a certainty to a certain intent in every particular, adopted. This would be conformable neither to correct principles nor to our own adjudications.

PETERS, J., was of opinion that this case was not distinguishable in principle from *Pettibone v. Griswold*; and would, therefore, affirm the decree of the superior court.

BRAINARD, J., concurred with the Chief Justice.

BRISTOL, J., said that, aside from the case of *Pettibone v. Griswold*, he should have no doubt that the mortgage in question was good; but that case had produced some hesitation in his mind; and he was inclined to think that the present case must be governed by it.

Decree reversed.

ROBINSON v. WILLIAMS

COURT OF APPEALS OF NEW YORK, 1860

(22 N. Y. 380)

APPEAL from the Superior Court of the city of Buffalo. Action by the receiver of the Hollister Bank, against Williams, the receiver of the Reciprocity Bank, and other defendants, for the foreclosure of a mortgage. Prior to September, 1857, both banks were doing business in the city of Buffalo.

Upon the trial these facts were proved: On the 24th of October, 1854, the defendants Gibson and wife executed and delivered a mortgage to the Hollister Bank, which recited that in consideration of the sum of \$1 to them in hand paid, and for the purposes thereafter declared and stated, they granted and conveyed to said bank certain premises therein particularly described. The mortgage contained a further recital as follows: "Whereas, it is contemplated that the said party of the second part will hereafter from time to time make loans or advances, by way of discount or otherwise, to the said Charles D. Gibson, upon drafts, bills of exchange, promissory notes and commercial paper, either made and drawn, or accepted or indorsed by said Gibson, and it has been agreed that these presents shall be executed to indemnify and secure the said party of the second part on account of any such loans, advances or discounts: Now therefore the condition of these presents is expressly this: that if the said Charles D. Gibson, his heirs, &c., shall and do well and truly pay, retire and take up at maturity any and all such drafts, bills of exchange, promissory notes or commercial paper, as *may be discounted or advanced upon* by the said party of the second part, *for or to the said Gibson*, and shall well and truly pay at maturity all *and every such loans, discounts or advances*, as above recited, and shall well and truly indemnify, pay and save harmless the said party of the second part from and against all loss, costs, damages, expenses and interests by reason thereof, then these presents shall cease and be null and void." But in case of the non-fulfilment of the above conditions, then the party of the second part was authorized to sell the mortgaged premises and to make and execute to the purchaser a deed therefor.

The mortgage was duly acknowledged on the 25th of October, 1854, and recorded on that day in the Clerk's office of Erie County. On the 1st of December, 1855, the defendant Gibson drew his bill of exchange on one Greenleaf, at Boston, whereby he requested said Greenleaf to pay to his own order the sum of \$2500, sixty days from the date thereof; and before said bill became due and payable Gibson indorsed the same to the Hollister Bank, which, on the faith and security of said bill and said mortgage, discounted the same and advanced to said Gibson the amount thereof. This bill was protested at maturity, and no part thereof has ever been paid. On the 29th of December, 1855, Gibson drew another bill of exchange on Greenleaf at sixty days from date, whereby he requested him to pay to his (Gibson's) order, the sum of \$1800.

Before this bill became due, Gibson indorsed it to the Hollister

Bank, which discounted it and advanced to him the amount thereof on the faith of said bill and the mortgage. This bill was also protested at maturity, and no part thereof has been paid.

The complaint set up that the defendant Williams, among others, claimed some interest in the mortgaged premises, and prayed the usual judgment of foreclosure and sale, and that said defendant, and all others claiming interests therein subsequent to that of the Hollister Bank, might be barred and foreclosed. The defendant Williams set up and proved that, on the 29th of January, 1856, the Sackett's Harbor Bank (whose name was subsequently changed, by an act of the legislature, to that of the Reciprocity Bank), recovered a judgment against said Gibson to the amount of \$2798.29; that a transcript thereof was duly docketed in the Clerk's office of Erie County on that day; that said Gibson was then the owner of said mortgaged premises; and Williams insisted that said judgment was a lien on said premises, and prior to that of the mortgage. Neither of said bills of exchange were due at the date of the recovery of said judgment. The Superior Court of Buffalo, at special term, gave judgment in favor of the plaintiff, and declared said mortgage to be a prior lien to said judgment. On appeal, the same was affirmed at general term, and from that judgment the defendant Williams appealed to this court.

DAVIES, J.¹ There can be no doubt that, as between the original parties to this mortgage, the validity of it, as a pledge of the mortgaged premises to secure the amount of these two drafts, could not be questioned. It was clearly the intent of the parties that the lands described should stand as security for all advances and discounts made by the Hollister Bank to Gibson. If, therefore, there were no legal mortgage, there was, undeniably, an equitable one, which a court of equity would enforce against the original parties to it, and all others not in the condition of *bona fide* purchasers or subsequent incumbrancers without notice. The advances made to Gibson were before the recovery of the Reciprocity Bank's judgment. As soon as the advances were made, they were embraced in and secured by the mortgage. That judgments and mortgages may be taken to secure future advances, though no present indebtedness was subsisting at the time of their execution or rendition, has long been well settled (*Conrad v. The Atlantic Ins. Co.*, 1 Peters, 386; *Leeds v. Cameron*, 3 Sumn. 488; *Hubbard v. Savage*, 8 Conn. 215; *Walker v. Snediker*, 1 Hoff. Ch. 145; *Com.*

¹ Portion of opinion omitted.

Bank v. Cunningham, 24 Pick. 270; *Monell v. Smith & Jenkins*, 5 Cow. 441; *Lyle v. Duccomb*, 5 Bin. 585; 4 Kent's Com. 175; *Lansing v. Woodworth*, 1 Sand. Ch. 43; *Barry v. Merchants' Ex. Co.*, 1 id. 314; *United States v. Hooe*, 3 Cranch, 73; *Livingston & Tracy v. McInlay*, 16 Johns. 165; *Truscott v. King*, 2 Seld. 147).

It is pressed upon us that this mortgage is invalid, because no sum certain is mentioned therein. There might be some force in the argument if the Reciprocity Bank stood in the position of a subsequent purchaser or incumbrancer in good faith, although it will be attempted to be shown that the mortgage would be good as against the bank, even if such were its position. That question will be considered hereafter.

I arrive, therefore, to the conclusion, that this is a valid mortgage as between the parties to it, and that the mortgagee was secured thereby the amount of the advances upon the two drafts mentioned in the complaint, although no sum certain was mentioned on the face of the mortgage. These advances were made prior to the recovery of the judgment of the Reciprocity Bank, and prior, therefore, to any equities of that bank. It follows, therefore, they were made prior to any notice to the Hollister Bank of any such equities. No notice could be given of that which had not an existence. It is established then, it is submitted, that, at the date of the recovery of the judgment by the Reciprocity Bank against Gibson, the Hollister Bank had a good legal, and certainly equitable, mortgage upon the premises, to secure the amount of the two drafts already referred to. Was that judgment a prior lien to the mortgage? The judgment became a lien, at the time it was docketed, upon interest of the defendant therein in all lands in the county of Erie (2 R. S. 359). In equity, the land was undeniably bound to pay off the amount of these two drafts. The law is well settled, that the equitable mortgagee is entitled to a preference over subsequent judgment creditors (*Matter of Howe*, 1 Paige, 129, and the cases there cited; Willard's Eq. Jur. 441, 442; *Rockwell v. Hobby*, 2 Sand. Ch. 9; Hilliard on Mort., Vol. I, 451). If this mortgage is to be regarded simply as an equitable mortgage, there can be no question that, in accordance with well-settled rules of law and a uniform current of decision, it is a valid security, and is entitled to priority over the subsequent judgment of the Reciprocity Bank.

But, I think, if that bank had been a purchaser on the day of the recovering of its judgment, or an incumbrancer by way of mortgage for money then advanced, the mortgage of the Hollister

Bank would equally have been entitled to priority. The recording of the mortgage was notice that the Hollister Bank had a mortgage on the premises for the purposes therein specified. There was enough to have put a *bona fide* purchaser or incumbrancer upon inquiry; and an application to the Hollister Bank would have disclosed the sum certain for which the security was held. As was said by the Supreme Court in *Monell v. Smith, supra*, "we may be obliged to look beyond the face of the bond to see what is due. In a technical sense, that is certain which may be made certain." The precise sum for which the mortgage was held as security might, at any time, readily and with certainty, have been ascertained, and a *bona fide* purchaser or incumbrancer, with the notice which the record of this mortgage furnished him, if he had omitted to make the inquiry which it indicated, could hardly have claimed to have been a *bona fide* purchaser or incumbrancer. The authorities bearing on this question of notice are fully reviewed in the case of *Williamson v. Brown*, 15 N. Y. 354, and the result of them stated as follows: "The true doctrine on this subject is, that where a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered as a *bona fide* purchaser."

In any aspect in which this case may be regarded, we think it free from doubt, and that the judgment appealed from should be affirmed, with costs.

All the judges concurring,

Judgment affirmed.

YOUNGS v. WILSON

COURT OF APPEALS OF NEW YORK, 1863

(27 N. Y. 351)

APPEAL from the Supreme Court. Action to foreclose a mortgage. The complaint set forth a bond, executed by Moses W. Eastman to George Youngs and Abel Hunt, bearing date June 4, 1849, in the penal sum of two thousand four hundred dollars, with a condition similar to that of the mortgage next mentioned.

It also set forth a mortgage, bearing the same date and between

the same parties, by which Eastman conveyed to Youngs and Hunt certain lands in Yates County, which were particularly described, which conveyance was made subject to the following condition, viz.: "That if the said Moses W. Eastman shall well and truly pay, and save harmless, and indemnify the said George Youngs and Abel Hunt, and each of them, of and from all liabilities which they, or either of them, may have at any time heretofore contracted to and for the said Moses E. Eastman, either as surety, indorsers or guarantors, or otherwise, whether now due or yet to grow due, and shall save harmless the said George Youngs and Abel Hunt, and each of them, of and from all damages, costs and charges on account of the same," then the conveyance was to cease; but in case "default should be made in the payment of all or any part of the said liabilities, as the same should become due," the lands were to be sold and the amount due, with costs and charges, to be deducted from the proceeds, and the surplus, if any, paid to the mortgagor.

The complaint also stated, that the mortgage was duly recorded in the clerk's office of Yates County, on the day of its date; that Youngs had paid debts of Eastman, on which he was liable as surety or indorser, at the time when the mortgage was executed, which amounted to \$724.61 [of which a particular account was given]; and that the estate of Hunt remained liable on a note given by Eastman to one Owens, on the 24th day of December, 1846, for \$263, on which said Hunt was indorser, which, with interest, still remained unpaid; that the mortgaged premises had been conveyed to the defendant, James Miles, who, with the other defendants, claimed some interest in the premises, which interest had accrued subsequent to the lien of the mortgage. There was the usual prayer for a foreclosure, and a sale of the mortgaged premises, and payment of the plaintiffs' demands and costs out of the proceeds.

The usual judgment of foreclosure for the sale of the mortgaged premises, and the payment, out of the proceeds of the sale, of the costs and expenses, and the amounts found due to the several plaintiffs, was entered at a special term; from which judgment Lewis O. Wilson, only, appealed to the Supreme Court at general term. On the hearing of that appeal, the judgment at the special term was reversed, and the complaint dismissed, as against the appellant, with costs, on the ground that the mortgage was fraudulent and void, as against creditors of the mortgagor, for uncertainty in respect to the debt or debts it was intended to secure.

From that judgment the plaintiffs brought the present appeal. After the bringing of such appeal both the appellants died, and the personal representatives of the appellant Youngs were substituted in his place. There had been no substitution as to the executors of Abel Hunt, and it was assumed, on the argument, that as to them the appeal was at an end.

SELDEN, J. I cannot concur with the court below in the opinion that the mortgage in question was void as against creditors or purchasers. There is no pretence, and could be none, that it was not valid between the parties to it. It described the debts which it was intended to secure, with such certainty that there could be no difficulty in determining what debts were, and what were not, embraced in the description. In such cases, the maxim, that that is certain which may be made certain, applies. It is not requisite that the condition should be so completely certain as to preclude the necessity of extraneous inquiry (*Monell v. Smith*, 5 Cow. 441; *Robinson v. Williams*, 22 N. Y. 380; *Stoughton v. Pasco*, 5 Conn. 442; *Merrills v. Swift*, 18 *id.* 257; *United States v. Hooe*, 3 Cranch, 73; *Kramer v. The Farmers' and Mechanics' Bank*, 15 Ohio, 253).

The mortgage having been duly recorded, if not fraudulent in fact, was as effectual against subsequent creditors and purchasers as it was against the mortgagor. If it was sufficiently certain to be valid against the party who made it, it was equally certain and valid against all persons claiming under him. If valid between the parties it was a mortgage, and as it was duly recorded, it was not within the provision of the statute which declares void, as against subsequent purchasers, unrecorded conveyances. The only statute bearing upon the question is the following:

"Every conveyance of real estate within this State, hereafter made, shall be recorded in the office of the clerk of the county where such real estate shall be situated; and every such conveyance *not so recorded* shall be void, as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded." I can discover nothing in this statute to justify the distinction between certainty as against the party, and certainty as against subsequent creditors or purchasers, which forms the basis of the judgment of the court below. If the instrument was certain enough to amount to a conveyance, it was a recorded conveyance, and valid as such.

A purchaser, with notice of any outstanding equity against his vendor, takes the place of such vendor and acquires his rights only (*Frost v. Beekman*, 1 Johns. Ch. 301; 3 Sugden on "Vendors and Purchasers," 440); and notice of circumstances sufficient to put a party upon inquiry, has the same effect as actual notice of the facts which could be learned on reasonable inquiry (3 Sugden, 468; *Dunham v. Dey*, 15 Johns. 569; *Peters v. Goodrich*, 3 Conn. 150; *Williamson v. Brown*, 15 N. Y. 359). The registry of the mortgage was equivalent to actual notice of its existence and contents, and the purchaser, with such notice, is bound by all the equities which the holder of the mortgage had against the mortgagor, whose place he takes (*Stoughton v. Pasco*, 5 Conn. 442, 447). The condition of the purchaser in the present case is precisely the same as it would have been at common law, if he had purchased with actual notice of the prior mortgage. In that case it cannot be doubted that he would have taken subject to the mortgage, if it was valid against the mortgagor.

The rule adopted in Connecticut, in *Hart v. Chalker*, 14 Conn. 77, on which the court below placed much reliance, is, that "where a mortgage is given to secure an ascertained debt, the amount of the debt ought to be stated." I am not disposed to question the wisdom of this rule, although it would sometimes be inconvenient and do injustice, and its propriety is not free from doubt (see 5 Conn. 449); but I cannot deduce it from our statute, which merely provides that conveyances not recorded shall be void against purchasers. The mortgage of Eastman was valid between the parties; it was a conveyance, and it was recorded, and therefore was not made void by the statute.

It is only with reference to the question of an actual intention to defraud creditors, that the indefinite description of the debts intended to be secured by the mortgage could be material. What influence such indefiniteness might have in that respect, we are not called upon to determine. There is no allegation in the answer which could raise that question, and if there had been, we could not notice it, in the absence of any finding by the court below upon the question of fact (*Grant v. Morse*, 22 N. Y. 324). I am, therefore, of opinion that the court below erred in declaring the mortgage void, as against Wilson.

Upon the other questions presented by the case, so far as they related to the rights of George Youngs (and to that extent only are they now before the court), I entertain no doubt that they were correctly decided by the special term. The judgment of the gen-

eral term should, therefore, be reversed, and that of the special term affirmed, as to the relief granted by that judgment to George Youngs.

There are no appellants here representing the estate of Abel Hunt, and the judgment dismissing the complaint as against the executors of that estate, will not be affected by the judgment of this court. The propriety of bringing on the argument of the appeal, without the presence of parties representing that estate, is very questionable, but as neither of the parties before the court interposed any objection on that account, the defect in the proceedings, if it be one, has not been regarded.

Denio, Ch. J., Davies, Wright, Selden, Emott and Balcom, JJ., concurring,

*Judgment accordingly.*¹

ACKERMAN *v.* HUNSICKER

COURT OF APPEALS OF NEW YORK, 1881

(85 N. Y. 43)

APPEAL from order of the General Term of the Supreme Court, in the fourth judicial department, made April 6, 1880, reserving a judgment in favor of plaintiff, entered upon the report of a referee and granting a new trial. (Reported below, 21 Hun, 53.)

This action was brought to foreclose a mortgage executed by the defendant Levi, upon lands situate in the city of Syracuse. Certain of the defendants, who were judgment creditors of the mortgagor, answered, claiming that their judgments were liens superior to the mortgage, as to a portion of the amount claimed by plaintiff to be secured thereby.

ANDREWS, J.² The mortgage from Levi, to the plaintiff, was given to secure the mortgagee, for any indorsements he had made, or should thereafter make, for the mortgagor, or the firm of Levi & Miller, to the amount of \$6,000. It was dated May 2, 1874, and was recorded May 3, 1874. The first indorsement was made May 7, 1874, and the last October 16, 1874. The plaintiff has been compelled to pay the indorsed paper, and has advanced for that purpose the sum of nearly \$5,000, over and above all payments

¹ Concurring opinion of MARVIN, J., omitted.

² Portion of opinion omitted.

made by the mortgagor. This action is brought to foreclose the mortgage, and the only controversy relates to the priority of lien as between the mortgagee and judgment creditors of the mortgagor, whose judgments were obtained subsequent to the mortgage, but prior to the indorsement by the plaintiff, of some of the notes, which enter into and form a part of the mortgage debt.

The question is whether the mortgage is a paramount lien to the judgments, as to that part of the mortgage debt, arising out of indorsements made after the judgments were docketed. It is not claimed that the plaintiff had actual notice of the judgments when he indorsed the paper, and it is found by the referee that he never had personal notice or knowledge, or any notice of their existence, until after all the indorsements had been made. The judgments were docketed in the country where the mortgaged premises were situated. If the docketing of the judgments was constructive notice to the plaintiff of their existence, then he had notice of the judgments; otherwise he had none.

There is no question as to the validity of mortgages to secure future advances or liabilities. They have become a recognized form of security. Their frequent use has grown out of the necessities of trade, and their convenience in the transactions of business. They enable parties to provide for continuous dealings, the nature or extent of which may not be known or anticipated at the time, and they avoid the expense and inconvenience of executing a new security, on each new transaction. It is well known that such mortgages are constantly taken by banks, and bankers, as security for final balances, and banking facilities are extended, and daily credits given, in reliance upon them. Mortgages for future advances have sometimes been regarded with jealousy, but their validity is now fully recognized and established. (*Bank of Utica v. Finch*, 3 Barb. Ch. 294; *Truscott v. King*, 6 N. Y. 147; *Robinson v. Williams*, 22 id. 380; *Shirras v. Caig*, 7 Cranch, 34; *Lawrence v. Tucker*, 23 How. [U. S.] 14; *Leeds v. Cameron*, 3 Sumn. 492.)

There can be no doubt, therefore, that the mortgage in this case, as between the parties to it, is a valid security for the plaintiff's debt. It is equally clear that to prefer an intervening incumbrance over the claim of the plaintiff, would violate the understanding of the parties to the mortgage, at the time it was executed, for the plain intention was, that the interest of the mortgagor in the land, as it existed when the mortgage was given, should be bound as security for all liabilities which the plaintiff might incur as indorser, upon the faith of the mortgage. It could not have been intended

that the plaintiff should be deprived of any part of the security of the mortgage, for any part of the indorsed paper. It would have been a clear breach of good faith on the part of the mortgagor, if he had, without notice to the mortgagee, voluntarily incumbered the land by liens having priority of the mortgage, and then applied to the plaintiff for, and procured further indorsements.

If the judgments have a preference over the plaintiff's mortgage, as to indorsements made after the judgments were docketed, it must result from some superior equity of the judgment creditors, or from the effect of docketing the judgments, as constructive notice to the plaintiffs of their existence. The authorities are clear to the point, that upon general principles of equity, no such preference can be claimed. It must, I think, be conceded that, according to general principles of equity, the lien of the plaintiff's mortgage is superior to the lien of the judgments, as well for indorsements made prior to their rendition, as for those subsequently made without notice.

It remains to consider whether, under the statutory system for the registry of liens, the docketing of the judgments was constructive notice to the plaintiff. If the docketing of the judgments was constructive notice to him, of their existence, then, unquestionably, the judgments have preference to the plaintiff's mortgage as to all advances subsequently made.

The general principle of construction of the registry laws upon the point of notice, is that the registration of incumbrances is notice to subsequent incumbrancers only. They are prospective, and not retrospective, in their operation. (*Stuyvesant v. Hall*, 2 Barb. Ch. 151; *King v. McVickar*, 3 Sandf. Ch. 192; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271.) The plaintiff's mortgage was first made, and first recorded, and regarding these facts only, the mortgage was the prior lien. It is claimed, however, that the mortgage did not become an actual lien or incumbrance until the indorsements were made, and that as to each indorsement it became in effect a new mortgage, as of the time when such indorsement was made, and that as to indorsements made subsequent to the docketing of the judgments, the mortgage must be deemed a subsequent lien. It is manifestly true that the mortgage did not become an actual charge on the land, so as to be enforceable by the plaintiff, until he had incurred liability as indorser. But the plaintiff's mortgage was an instrument capable of being recorded under the statute, before any liability had been incurred. It is the general practice to record mortgages, and docket judgments, taken

to secure future advances and contemplated liabilities, before an actual indebtedness arises. On being recorded, the record is notice to subsequent purchasers and incumbrancers, and they are put upon inquiry and have the means of ascertaining to what extent advances have been made, and by notice, to prevent further advances to their prejudice.

The doctrine that a party who takes a mortgage to secure further optional advances, upon recording his mortgage is protected against intervening liens, for advances made upon the faith and within the limits of the security, until he has notice of such intervening lien, and that the recording of the subsequent lien is not constructive notice to him, has, we think, been generally accepted as the law of the State, at least since the decision in *Truscott v. King*, 6 N. Y. 147. It would not be wise, under the circumstances, now to adopt the opposite view, even though we should regard it as better supported by reason. It seems to us, however, that the doctrine which we have affirmed in this case is most consistent with equity, and establishes a rule which is reasonable, and easy of application. The opposite rule imposes the burden of notice and vigilance upon the wrong person. The party taking the subsequent security may protect himself by notice, and as is said by Mr. Jarman in his notes to Bytherwood's Conveyancing: "No person ought to accept a security subject to a mortgage authorizing future advances, without treating it as an actual advancement to that extent."

These views lead to a reversal of the order of the General Term and an affirmance of the judgment entered upon the report of the referee.

All concur.

*Order reversed and judgment affirmed.*¹

¹ The cases are numerous: *Commercial Bank v. Cunningham*, 24 Pick. 270 (1837); *Goddard v. Sawyer*, 9 Allen, 78 (1864); *McDaniels v. Colvin*, 16 Vt. 300 (1844); *Collins v. Carlile*, 13 Ill. 254 (1851); *Speer v.*

Skinner, 35 Ill. 282 (1864); *Michigan Ins. Co. v. Brown*, 11 Mich. 266 (1863); *Madigan v. Mead*, 31 Minn. 94 (1883); *Freiberg v. Magale*, 70 Tex. 116 (1888).

HYMAN *v.* HAUFF

COURT OF APPEALS OF NEW YORK, 1893

(138 N. Y. 48)

O'BRIEN, J. This was a controversy between subsequent lienors as to the right to surplus moneys arising upon foreclosure sale in this action. Two of the defendants owned seven lots in the city of New York, upon which they desired to construct seven dwellings. They first gave a mortgage to the plaintiff to secure the payment of money advanced or to be advanced during the progress of the work. They subsequently made contracts with various parties for materials and work to be delivered and performed in the future, as specified in the contracts, and executed bonds and mortgages, absolute on their face, but intended by the parties to secure the payment of the moneys stipulated in the contracts. The mortgages were delivered and recorded in the following order: The Lorillard Brick Works Co., \$6,000, October 28, 1890, recorded November 8, 1890; The Buffalo Door and Sash Co., \$16,700, December 16, 1890, recorded December 22, 1890; Cassidy & Adler, \$7,500, December 16, 1890, recorded December 23, 1890; Michael McCormick, \$3,000, December 19, 1890, recorded December 27, 1890. There was a surplus of \$27,687.76 upon the sale after paying the plaintiff's mortgage and the costs. The referee appointed to report upon the respective claims to this surplus made full findings of fact and law, in which he held that distribution should be made as follows: (1) The expenses and costs of the proceedings; (3) the receiver of the Lorillard Co. \$6,000, with interest from October 5, 1891; (3) the Buffalo Co. \$14,200, with interest from August 6, 1891; (4) Cassidy & Adler \$7,500, with interest from June 19, 1890. This exhausted the surplus and left a considerable sum upon the last-named claim unpaid. The mortgage of McCormick, the payment of which was postponed for the other claims, which were preferred, had been assigned to James Rogers, who insisted, in the proceedings, that his claim, though subsequent in point of time, was, nevertheless, entitled to preference over the Buffalo Company and Cassidy & Adler, on account of certain equities in his favor, which will be hereafter considered. The referee decided against his claim, and the court confirmed the report and ordered the moneys to be distributed accordingly. The court also ordered that Rogers pay the

sum of \$503.62 to Cassidy & Adler to reimburse them for a portion of the loss sustained by them in the depletion of the fund, by the payment of costs caused by his unsuccessful contention. He is the only party who has appealed, and the questions are raised by his exceptions to the report. It is only necessary to state generally the attitude of the appellant, with respect to the claim of the Buffalo Company, in order to present the main question raised by his appeal. That mortgage was given by the owners to secure their payments, as stipulated in the contract between them and the company, for furnishing sash, doors and other trim for the seven houses. It bound the owners to make payments in cash to the company in different sums, at different times in the future, and as the materials were furnished. It was agreed that if the owners should fail to make the payments, according to the terms of the contract, the company might, at its option, cease to deliver materials, and thereupon the mortgage should become due to the extent of the goods delivered. The payments were not made as provided. The instrument also contained the following provision: "It is further agreed that in case any lien or incumbrance of any kind shall be filed or docketed against or placed upon the said premises, or any part thereof, during the performance of this contract, the parties of the first part may, at their option, cease to deliver materials hereunder, and unless such lien or incumbrance shall be discharged of record within ten days, the said bond and mortgage shall thereupon become due and payable to the extent of the materials which shall then have been delivered."

There were liens and incumbrances subsequently placed upon the property by the owners, as we have seen. The appellant contends, upon substantially these facts, that the mortgage was to secure future advances which were optional merely, and that as to all such advances, made after notice of his mortgage, he has the prior lien. If he is right in this position sufficient of the claims which have been held superior to his would be postponed to enable him to realize upon his debts. The doctrine applicable to mortgages given to secure voluntary future advances, as affected by subsequent liens, has been discussed in England and seems to have been settled there in accordance with the contention of the appellant, though not without controversy and strong dissent. (*Gordon v. Graham*, 2 Eq. Cas. Abr. 598; *Hopkinson v. Rolt*, 9 H. L. 514; *London & C. Bkg. Co. v. Ratcliffe*, 6 App. Cases, H. L. 722; *Bradford Bkg. Co. v. Briggs*, 12 *id.* 29.)

These cases hold that the lien of a mortgage, to secure voluntary

future advances, will be postponed, as to such advances as are made after knowledge of the existence of a subsequent mortgage, in favor of the holder of the latter. Substantially, this rule seems to have been followed in several of our sister states. (*Montgomery's Appeal*, 36 Penn. St. 170; *Spader v. Lawler*, 17 Ohio, 371; *Ladue v. Detroit*, 13 Mich. 390; *Collins v. Carlile*, 13 Ill. 254; *Boswell v. Goodwin*, 31 Conn. 74.)

The general doctrine as announced in *Hopkinson v. Rolt* (*supra*), which is the leading case in England,¹ has been referred to by this court with approval, though, it seems to me, that the precise question was not decided. (*Ackerman v. Hunsicker*, 85 N. Y. 43; *Truscott v. King*, 6 *id.* 147.)

Without attempting to discuss the equity of the rule or to point out its precise limits and application it is quite clear that it can operate only against a security for future advances, purely and plainly optional, the holder of which has actual notice of a subsequent mortgage for an existing debt or liability. The mortgage which the appellant holds was given to McCormick to secure to him the payment of certain sums of money for work to be performed in the future in the construction of the houses. It is not clear from the record that the contract which it was given to secure was any more obligatory upon him than was the other contract with the Buffalo Company, and if it was not, then the appellant has no superior equity in his favor. But we think that the mortgage to the Buffalo Company was not to secure future optional advances within the rule referred to. At its inception and upon its face, both parties were bound to perform it, at the peril of being subjected to damages. True, it contains a provision that if the owner fails to make his payments for the property furnished, as they become due, then the other party is absolved from the obligation to make further performance. But that is the case with most executory contracts, and the clause expresses nothing more than what the law would imply ordinarily upon the same facts. The other provision was that the obligation to make further delivery of materials should cease whenever the owner permitted

¹ In *West v. Williams* [1898], 1 Ch. Div. 488, the court, commenting upon the English decisions, said: "Neither in *Hopkinson v. Rolt*, nor in any of the cases which have followed it, has there been, so far as I am aware, any obligation on the first mortgagee to make further ad-

vances; and in *Hopkinson v. Rolt*, the mortgage was created in favor of bankers and to secure a current account. It seems to me that, if once you introduce the element or obligation to make further advances, the authority of *Hopkinson v. Rolt* is inapplicable."

any subsequent lien or incumbrance to be filed. These provisions were both for the benefit of the Buffalo Company, and if it elected to waive them and go on and complete its contract according to its terms, no subsequent mortgagee has any right to question the equity of its claim to payment. If the party in whose favor the stipulation was made chooses to waive it a stranger to the contract cannot complain or derive any advantage or raise any question based upon a fact that in no way concerned him. When it appears as matter of law, from an inspection of the instrument, that the prior mortgagee may decline to make the advances at his pleasure, without taking the risk of subjecting himself to damages or loss, the rule can be defended upon equitable principles. But where the obligation to advance exists, or where the right to decline depends upon facts *dehors* the instrument, and which may be the subject of dispute or contention, the holder of the first security is warranted in making the advances in reliance upon his mortgage. In the present case the Buffalo Company had no right to refuse further delivery of goods unless it could establish a breach of some of the conditions of the contract upon which the right to refuse depended. This it could not do by a mere production and inspection of the writing, but would be obliged to resort to proof of extraneous facts which might be disputed, and, in some cases, it is quite conceivable that a party might fail in the attempt to establish them to the satisfaction of a court or jury. It would be incorrect in law and unjust in practice to hold that goods, delivered under such a contract, were subject to the rule applicable to mere optional advances. Moreover this contract may have been, and, we must assume was, a profitable one for the parties who agreed to furnish the building materials. They could not decline to go on, when the subsequent mortgage was given, without sacrificing profits to be derived from a full performance. The company not only protected itself by conditions in the contract for its own benefit, but by mortgage security. It was entitled to all the fruits of the contract, and, though the other party did not perform in all respects, the company could waive the omission and still go on earning these fruits, upon the faith of its security. To hold that, under such circumstances, a subsequent mortgage and a stranger could arrest the performance of such a contract, against the will of the immediate parties, would be, practically, to impair its obligations. All the cases hold that the principle does not apply when a party subjects himself to damages by declining to perform or to make the advances, and, if not, why should it apply to a case

where the loss of the profits or fruits of the contract must follow a failure or omission to perform. In many cases the profits which a party is to derive from full performance of his contract are much larger than any damages which the other party to it could recover against him for failure to perform.

It appears that the appellant's mortgage was upon its face expressly subject to all prior mortgages, and, further, that McCormick, after the assignment of it to appellant as collateral security, executed an instrument to the Buffalo Company in which he stipulated that, irrespective of the date of the delivery of the material, the prior mortgage should be and remain the superior security. Of course, the object of the stipulation was to avoid the very question we have been considering. What effect it had and how far, if at all, it bound the appellant and what significance is to be attached to this clause in the mortgage, expressly subordinating it to all mortgages of prior date and record, are questions of interest ably discussed upon the briefs of counsel, and which have received the attention of the courts below. But as the appellant's claim of equitable priority, which, so far as he is concerned, is fundamental, cannot be sustained, it is unnecessary to consider the other questions.

It follows that the order appealed from must be affirmed, with costs.

All concur.

*Order affirmed.*¹

¹ In *Scheurer v. Brown*, 67 App. Div. (N. Y.) 567 (1902), HATCH, J., said (p. 572): "A mortgage is valid which is given to secure future advances (*Ackerman v. Hunsicker*, 85 N. Y. 43), and may, under certain circumstances, be good as against a junior incumbrancer, even though all of the advances have not been in fact made. The extent to which it may be enforced, for advances made after notice of a junior incumbrance, it is not now necessary for us to decide, and we express no opinion thereon. It is clear, however, that where the liability to make such advances is optional with the mortgagee, he will not be protected in making them after notice of the existence of the junior incumbrance. (*Hyman v. Hauff*, 138 N. Y. 48)."

In *Brinkmeyer v. Browneller*, 55 Ind. 487 (1876), WORDEN, C. J., said: "We shall not enter upon any

lengthy discussion of the general doctrine applicable to mortgages given to secure future advances. The following propositions, however, we think, are settled by the authorities:

First. Where the mortgagee has bound himself to make advances or incur liabilities, such advances, when made, shall relate back, and the mortgage will be a valid lien for advances made or liabilities incurred, against subsequent purchasers or encumbrancers with notice, actual or constructive, of the mortgage.

Second. Where there is no obligation on the mortgagee, and such advances or liabilities are merely optional with him, and he has actual notice of a subsequent encumbrance or conveyance of the mortgaged premises, before making advances or incurring liabilities, his lien is not good, as against the subsequent purchaser or encumbrancer."

BOOK III
NATURE AND INCIDENTS OF THE MORTGAGE
RELATION

CHAPTER I
COMMON LAW RELATIONS

SECTION I.—TITLE

NOYS *v.* MORDANT

HIGH COURT OF CHANCERY, 1706

(Finch, Pre. Ch. 265)

A., being in possession of an estate that was a mortgage in fee, by will devises it to his daughters B. and C. and their heirs, and dies; B. marries and dies; the question was, Whether the share of B. should be decreed real or personal estate, and consequently go to her heir, or to her husband as her administrator?

MY LORD KEEPER decreed it against the husband, and put this case: A man seised of lands in fee, which were only mortgaged to him, devises them to his son and heir, and his heirs; surely these lands shall descend as an inheritance; or, though the mortgage be paid off, shall not the money be considered as lands, and go to the heir, and his heirs, as the lands would have done, and this purely by the intention of the testator? And did not the testator, who had a governing power, intend, in the present case, that the mortgaged lands should be considered as any other lands of inheritance, and be subject to, and directed by, the same rules that other estates are? ¹

¹ "And in this case it was declared by the *Lord Chancellor* [Nottingham] that always when a mortgagee dies and makes no devise of the lands he has in mortgage, they shall go to the executor. And in London there

is this special custom, that lands in mortgage are always reckoned the personal estate of the mortgagee, he being a citizen."—*Winn v. Littleton*, 1 Vern. 3 (1681). And see, *Fisk v. Fisk*, *Finch, Pre. Ch.* 11 (1690).

BURDEN v. KENNEDY

HIGH COURT OF CHANCERY, 1757

(3 Atk. 739)

LORD CHANCELLOR [HARDWICKE]. Where an execution by *elegit* or *fieri facias* is lodged in a sheriff's hands, it binds goods from that time, except in the case of the crown, and a leasehold estate is also affected from that time; and if the debtor subsequent to this makes an assignment of the leasehold estate, the judgment creditor need not bring a suit in ejectment, to come at the leasehold estate, by setting aside the assignment, but may proceed at law to sell the term, and the vendee, who is generally a friend of the plaintiff, will be entitled at law to the possession, notwithstanding such assignment.

But in the present case here is only an equity of redemption in the debtor in the leasehold estate, and an execution lodged will not affect this, as the legal estate is in the mortgagee; and consequently, by the common equity of this court, he may come here to redeem a subsequent incumbrancer, and likewise to discover whether there was any and what consideration for the assignment.¹

¹ In *Williams v. Williams*, 270 Ill. 552 (1915), Justice COOKE said at pages 555-6:

"It is true, as plaintiffs in error contend, that in the case of a common law mortgage the mortgagor is the legal owner of the mortgaged property as against all persons except the mortgagee or his assigns. (*City of Chicago v. Sullivan Machinery Co.*, 269 Ill. 58.) The mortgagor's interest in the land may be sold under execution; his widow is entitled to dower in it; it passes as real estate by devise; it descends to his heirs as real estate upon his death, intestate; he may maintain an action

for the land against a stranger and the mortgage cannot be set up as a defense. On the other hand, the mortgagee has no such estate as can be sold under execution; his widow has no right to dower in it; upon his death the mortgage passes to his personal representative as personal estate and passes by his will as personal property. The mortgagor may convey his title or mortgage it to successive mortgagees, and his grantee or mortgagee will succeed to his estate and occupy his position, subject to the incumbrance. (*Lightcap v. Bradley*, 186 Ill. 510.)"

MCMURPHY v. MINOT

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE, 1827

(4 N. H. 251)

THIS was an action of covenant broken, on an indenture made the 12th July, 1811, by which the plaintiff demised to Seth Daniels a certain tract of land to hold during her natural life, and the said Daniels covenanted with the plaintiff to pay her, on the first day of May, annually, a rent of \$30. The action was brought against the defendant, as assignee of Daniels, for the said rent from 1st May, 1817, to 1st May, 1825, and was submitted to the decision of the court upon the following statement of facts:

The indenture was made as stated in the declaration and Daniels, having entered under it, afterwards conveyed all his estate to one Gilman Dudley, who, on the 3d April, 1822, conveyed the land to the defendant in fee and in mortgage. Dudley remained in possession and took the profits until his death in October, 1822, and after his decease his administratrix remained in possession, taking the profits until April, 1824. On the 16th April, 1824, a tenant entered upon part of the land under an agreement with the defendant to pay rent to him in case the land was not redeemed. On the 23d April, 1825, the administratrix of Gilman Dudley conveyed to the defendant the right in equity to redeem the land mortgaged as aforesaid, and the defendant's said tenant has been in possession of the whole tract from that time to the commencement of this action on the 22d March, 1826. All the interest which the plaintiff ever had in the land was an estate for her own life, and the reversion was in Daniels.

RICHARDSON, C. J. It has been urged in behalf of the defendant in this case that the plaintiff is not entitled to recover anything, because the rent was never demanded of Minot. The law on this point is well settled. When a lessor proceeds for a forfeiture or to enforce a penalty he must show a demand of a rent on the very day it was payable. But in an action of covenant no demand is necessary (*Remson v. Conklin*, 18 Johns. 447; Com. Dig. Rent., D. 4; *Coon v. Brickett*, 2 N. H. Rep. 163). We are therefore of opinion that this objection to the action cannot prevail.

It has also been urged that this action cannot be maintained, because the particular estate and the reversion having become

united in the same person the particular estate is merged and the rent extinguished. Had the rent in this case been incident to the reversion, it is clear that this action could not be maintained (*York v. Jones*, 2 N. H. Rep. 454). But it is well settled that the rent is not inseparably incident to a reversion (Co. Lit. 143 and 47a; 2 Bl. Com. 176). Rent may be reserved upon a grant of a man's whole estate, in which case there can be no reversion. The case of *Webb v. Russell*, 7 D. & E. 393, which has been cited by the defendants' counsel does [not] apply in this case. It was there held where rent is incident to a particular reversion, when that particular reversion is merged, the rent is extinguished. But in this case the rent was never incident to the reversion. The plaintiff granted her whole estate, reserving a rent, and she had no reversion to which it could be incident. In order to maintain this ground it must be shown that when he who has a reversion takes a lease of the particular estate and covenants to pay rent, such rent is extinguished by the union of the particular estate and the reversion. But this proposition cannot be sustained by any reason or authority, and we are of opinion that this ground of defence fails altogether.

But it is further contended on the part of the defendant that being only a mortgagee he cannot in any event be held liable for the rent until he took possession under the mortgage, and the case of *Eaton v. Jaques*, Doug. 438, is cited as an authority. But that decision has been long questioned (7 D. & E. 312), and in 1819 the question came before all the judges of England, and a great majority were of opinion that when a party takes an assignment of a lease by way of mortgage as a security for money lent, the whole interest passes to him and he becomes liable on the covenant for the payment of rent, though he has never occupied or become possessed in fact (*Williams v. Bosanquet et al.*, 1 Brod. & Bing. 72).

In this State it has been repeatedly decided that a mortgage in fee vests in the mortgagee the whole legal estate; the necessary consequence of which seems to be that such a mortgagee must be liable for the performance of covenants running with the land. And we think in this case the defendant is liable for any rent that became due after his mortgage was executed.

In considering this case, the question occurred to us whether the liability of the defendant could be affected by the circumstance that the rent was reserved upon a grant of the freehold, while the conveyance to him was in fee. But we find that it has been decided that covenant will lie against the assignee of part of an estate for

not repairing his part, for it is divisible and follows the land (*Congham v. King*, 2 East, 580; Cro. Car. 222). And we are not able to discover any reason why he who takes a larger estate should not be bound by a covenant running with a less estate which is parcel of a larger.

On behalf of the plaintiff it has been argued that the defendant is liable in this action, not only for the rent which has become due since he became owner of the land, but the rent which became due before that time. The cases which have been cited by the defendant's counsel seem to show that the law is not so. It is another argument in favor of the defendant, that when the action is against an assignee, it is usual to allege in assigning the breach of the covenant, that the breach happened after the assignment (2 Chitty's Pl. 191; Lilly, 134; *Dubois v. Van Orden*, 6 Johns. 105; Carthew, 177; 2 Ventris, 231). It is said in Woodfall, 274 and 338, that an assignee is liable for arrearages of rent incurred before, as well as during his enjoyment; but he cites no case in which it has been so decided, and offers no argument in support of the propositions, and we are of opinion that this is not law, and there must be judgment for the plaintiff for the rent which has become due since the 3d of April, 1822.

*Judgment for the plaintiff.*¹

ASTOR v. HOYT, 5 Wend. 603 (1830). Suit in chancery by the landlord of premises in the City of New York to establish his claim to certain monies awarded to the tenant (Madden) as compensation for opening streets through the premises demised. Madden had mortgaged his term to Hoyt, who thus acquired a prior claim to the fund in question. Madden having covenanted in the lease to pay all assessments, the plaintiff seeks to charge the liability for the breach on the mortgagee. The Chancellor (Walworth) having ordered the payment of the fund in court to the defendant, an appeal was taken by the plaintiff to the Court for the Correction of Errors. On the point under consideration the following opinion was rendered (page 613).

SAVAGE, Ch. J. The question then arises, which was principally discussed upon the argument, is the mortgagee to be considered the

¹ *Farmers' Bank v. Mutual Assur. Soc.*, 4 Lehigh (Va.), 69 (1832); *Mayhew v. Hardesty*, 8 Md. 479 (1855), accord. See also, *Calvert v. Bradley*, 16 How. (U. S.) 580 (1853).

assignee of the leasehold premises? And if so, is he liable to payment of the damages for the breach of Madden's covenant? That the covenant to pay all assessments is a covenant running with the land, there can be no doubt (5 Co. 25); and that the assignee is liable for the breach of such a covenant occurring while he is assignee, is equally clear; but whether the mortgagee is assignee, and if assignee, whether he is liable for breaches of the covenant before the assignment, are questions to be discussed. In England I think it must be conceded to be settled that where the mortgagor, by the form of the instrument, conveys or assigns by way of mortgage his whole estate, the mortgagee is considered, at law and in equity too, the assignee. We read, indeed, in some of the books that though the mortgage purports to convey an estate defeasible by matter subsequent, yet that the courts of equity consider them, in their true intent, as mere securities for money; but the decision of the courts, both of law and equity, which are the highest evidence of what the law is, have generally considered mortgages as conveyances; and by the mode of drawing them there it seems necessary that when the condition is performed there should be a reconveyance or reassignment. In *Sparks v. Smith*, 2 Vernon, 275, the court refused to compel a mortgagee to disclose whether a lease was assigned to him to enable the plaintiff to prosecute him as assignee upon the covenant of the lessee, who was also mortgagor, clearly implying that as assignee of the whole term, even by way of mortgage, he would be liable; and in *Pilkington v. Shaller*, 2 Vern. 374, where a recovery had been had in a similar case against the plaintiff as assignee, the court refused to relieve him, saying the mortgagee was ill advised to take an assignment of the whole term. In the case of *Eaton v. Jaques*, Doug. 460, the Court of King's Bench disregarded these cases and thought them not well considered. Lord Mansfield was of opinion that upon principle the assignee is liable only in respect of the possession, and that as a mortgage was a mere security, the mortgagee out of possession was not liable as assignee. About ten years afterwards Lord Thurlow entertained a different opinion, and did what was refused in *Pilkington v. Shaller*. He compelled a person who had received a lease in deposit as security, to take an assignment, that he might be prosecuted as assignee upon the covenant of the lessee to build a house. The question seems to have been finally and deliberately settled in *Williams v. Bosanquet*, 1 Brod. & Bing. 72, by ten judges, overruling the doctrine of Lord Mansfield in *Eaton v. Jaques*. Dallas, Ch. J., in giving the decision of the court, states explicitly the

grounds of the decision. He shows from authority that the lessee is liable for the rent, whether he enter or not; he is liable by virtue of his lease, and he argues that the assignee is under the same liability, whether he takes an absolute assignment or only by way of security, for the lessee conveys by the assignment his whole interest, which the assignee takes; and as the lessee was liable before the entry, so must the assignee be liable in like manner. In that case, he remarks, the assignment was of all the right, title and interest of the assignor, and so completely did the interest pass that there was a covenant to reassign upon payment of the money. The money was not paid before the day when, if not paid, the assignment was to become absolute, so that the case was that of an absolute assignment. He also held there was a privity of estate, for the acceptance of the assignment was equal to actual entry, and privity of contract, because contract was with the lessee and his assigns, and the defendants were such assigns; therefore the contract was between the lessor and assignee.

Chancellor Walworth considers the case of *Williams v. Bosanquet* as settling the principle in England that a mortgagee of leasehold premises, whether in possession or not, is liable upon the covenants as assignee, but he thinks such a principle cannot prevail in this State, because we hold the mortgagor to be the true owner, and the mortgagee as having nothing but a chattel interest while out of possession. The counsel for the appellant insists, however, that in that respect there is no difference in the doctrine held in England and here, for Lord Mansfield said in *The King v. St. Michaels*, Doug. 632, it was an affront to common sense to say the mortgagor is not the real owner. Such was indeed the doctrine of Lord Mansfield and of Buller, Justice, but that is the very doctrine that is repudiated in *Williams v. Bosanquet*. Lord Mansfield asserts that the mortgagor is the real owner. Not so, says Ch. J. Dallas, giving the opinion of the ten judges; the whole interest is assigned; it vests absolutely, and is not the less absolute because the assignor (the mortgagor) may entitle himself to a re-assignment. Unless, therefore, a man can be the real owner after he has parted with all his interest, the chancellor must be right in saying that the English doctrine of the ten judges is inapplicable here. If the law is the same here as in England, and the law there is that the mortgagee out of possession has the whole estate, then this court was in error in the case of *Waters v. Stewart*, 1 Caines' Cas. in Err. 47, where they decided that the equity of redemption remaining in the mortgagor was real estate, and liable to be sold

on execution; and the Supreme Court were equally in error when they decided that the mortgagee out of possession had no interest which could be sold on execution (*Jackson v. Willard*, 4 Johns. R. 41), for if he had the whole estate it certainly might be sold. It would seem, too, that Powell must have been under a great mistake when he stated that the mortgagor might levy a fine or suffer a common recovery; that he had an estate which descended to his heirs, and which he might devise by his will (*Powell on Mortgages*, 75, 76, 170).

Here, however, the mortgagor is the owner against all the world, subject only to the lien of the mortgage. In *McIntyre v. Scott*, 8 Johns. R. 159, it was held that the mortgagee of a ship, out of possession, was not liable for supplies; and in *Runyan v. Mersereau*, 11 Johns. R. 538, the assignee of the mortgagor was permitted to maintain trespass against the mortgagee after condition broken. The court conclude their opinion in that case by saying: "The light in which mortgages have been considered in order to be consistent necessarily leads to the conclusion that the freehold must be considered in the plaintiff, and he of course is entitled to judgment." In that case the court rely on the doctrines of Lord Mansfield in *Eaton v. Jaques*, and to show that the interest of the mortgagee is only a chattel interest, they refer to the well-established principles that mortgages pass by a will not made with the solemnities of the statute, and that the assignment of the debt draws the land after it. In *Coles v. Coles*, 15 Johns. R. 320, Spencer, J., repeats the doctrine of *Runyan v. Mersereau*, and in that case it was decided that the wife might be endowed out of equity of redemption. In *Hitchcock v. Harrington*, 6 Johns. R. 295, Kent, Ch. J., says of the mortgage: "We now regard the mortgage estate only for the benefit of the mortgagee and his assigns. As to the rest of the world, as long as it is not put in force, it is only a pledge or lien on the bond, with which they have no concern any further than not to disturb it." And in *Dickinson v. Jackson*, 6 Cowen, 147, we held that until default in payment of the money due by the mortgage, or some part thereof, and the termination of a notice to quit, the mortgagee has no right of entry as against the mortgagor and cannot bring ejectment against him, though he may against the assignee of the mortgagor, the tenancy being broken by the assignment. It is too late for us now to retrace our steps and adopt the doctrine of *Williams v. Bosanquet*, even if it was correct. To recover against an assignee of the lessee it must be averred and proved that all the right, title and interest of the lessee passed by assignment to the

assignee. After these decisions, can we say that all the right, title and interest of the mortgagor has passed to the mortgagee out of possession? So far from it, we hold that the mortgagee, before foreclosure or the commencement of proceedings to foreclose, has but a chattel interest. It is perfectly clear, therefore, that a mortgagee of a term out of possession is not in this State to be considered the assignee. In England there must be a reconveyance or reassignment; so say the court in *Williams v. Bosanquet*. Here that is not necessary; the transfer of the debt transfers the mortgage; payment extinguishes the lien, and so does a tender. But if a mortgagee takes possession of the mortgaged premises lawfully, he must be then considered assignee, and the assignee must take the estate *cum onere*. When the mortgagee takes possession, he then has all the right, title and interest of the mortgagor; then he acquires and the mortgagor loses an estate liable to be sold on execution. He is therefore substituted in the place of the mortgagor, who was lessee, and therefore is assignee and liable as such.

If I am correct in the positions, that a portion of the fund in court is to be considered the representative of the premises taken for the street, and that the mortgagees, taking possession of either the premises or the substitute, became liable for such covenants as run with the land, and that this covenant to pay assessments is of that character, it seems to follow that the mortgagees in this case must be responsible for their proportion of the assessment, unless, as they allege, the breaches occurred previous to the assignment.¹

EATON v. WHITING, 3 Pick. 484 (1826).—PARKER, C. J. The opinion expressed in the case of *Blanchard v. Colburn*, 16 Mass.

¹ That a mortgage of a term does not constitute a breach of a covenant not to assign, see *Riggs v. Pursell*, 66 N. Y. 193 (1876); *Crouse v. Michell*, 130 Mich. 347, 90 N. W. 32 (1902). *Contra*,—*Serjeant, Nash, Field & Co.* [1903], 2 K. B. 403. *Cf. Doe v. Hogg*, 4 Dowl. & Ry. 226 (1824).

In *Johnston v. Flickinger*, 160 N. Y. Supp. 962 (1916), certain property was leased under a covenant forbidding any assignment of the leasehold without the consent of the landlord. Thereafter the lessee mortgaged his leasehold, and it was

sold under foreclosure proceedings. *Held*, the covenant in the lease against assignment was not violated, such sale being by operation of law. To similar effect see *Riggs v. Pursell*, *supra*; *Dunlop v. Mulry*, 85 App. Div. 498, 83 N. Y. Supp. 477, 1104 (1903). But see *Doe v. Hawke*, 2 East, 481 (1802); *West Shore Rd. v. Wenner*, 70 N. J. Law, 233, 50 Atl. 408, *aff'd* 71 N. J. L. 682, 60 Atl. 1134 (1904).

With the principal case, *cf. Century Holding Co. v. Ebling Brewing Co.*, 162 N. Y. Supp. 1061 (1917).

Rep. 345, that the interest of a mortgagee in real estate mortgaged to him for security of a debt, or the performance of a condition, is not liable to be levied upon for the debts of the mortgagee and so, of course, is not liable to attachment on *mesne* process, we see no cause to change. It is in fact but a chose in action, at least until entry to foreclose, and although the legal effect of the mortgage is to give an immediate right of entry or of action to the mortgagee, yet the estate does not become his, in fact, until he does some act to divest the mortgagor, who, to all intents and purposes, remains the owner of the land until the mortgagee chooses to assert his right under the deed. It is, as before said, in the nature of a pledge, and a pawn or pledge cannot be seized in execution for the debt of the pledgee. The mortgagor may be compelled to pay over the debt to the creditor of the mortgagee on the trustee process, with the same exceptions as are provided for other cases, and payment under such process will discharge the mortgage *pro tanto*; so that the creditor of the mortgagee is not without remedy, as has been suggested. The law in New York and Connecticut is the same as with us. In the courts of both those States it has been decided that a mortgagee before entry has not such an interest in the land as can be sold, levied upon, or attached. See *Jackson v. Willard*, 4 Johns. Rep. 41; *Runyan v. Mersereau*, 11 Johns. Rep. 534; *Johnson v. Hart*, 3 Johns. Cas. 329; also *Huntington v. Smith*, 4 Conn. Rep. 237, in which Hosmer, C. J., states at large the reasons similar to those given in *Blanchard v. Colburn* by this court. Before the case of *Blanchard v. Colburn* the same principle had been decided in the case of *Portland Bank v. Hall*, 13 Mass. Rep. 207. So that we are warranted in considering it as settled law, that the interest of a mortgagee before entry is not attachable,¹ and we might add with Hosmer, C. J., in the case cited from the Connecticut Reports,² that we doubt whether it is attachable before foreclosure, for until then all the inconveniences suggested as the ground of decision would occur.³

¹ "Judge Trowbridge was of a different opinion (*vide* 8 Mass. Rep. 565), and much respect is due to him. But the law respecting mortgaged estates has been changed by the legislature since his time, it being enacted by the statute of 1788, c. 51, that such estates shall be assets in the hands of executors and administrators, and be distributed as personal estate."—*Per* PARKER, C. J.,

in *Blanchard v. Colburn*, 16 Mass. 345 (1820).

² "The land cannot be taken for the debts of the mortgagee until his entry upon it, and, in my opinion, until foreclosure." *Huntington v. Smith*, 4 Conn. 235 (1822).

³ *Rickert v. Madeira*, 1 Rawle (Pa.), 325 (1829); *Nicholson v. Walker*, 4 Bradw. (Ill.) 404 (1879), *accord*. So are the authorities generally.

TRIMM v. MARSH

COURT OF APPEALS OF NEW YORK, 1874

(54 N. Y. 599)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiffs entered upon the decision of the court at Special Term, and ordering a new trial. (Reported below, 3 Lans. 509.)

This was an action for an accounting as to the amount due upon a bond and mortgage, and for the recovery of the possession of the mortgaged premises, upon payment of the amount due.

In 1858 one Ridgway, being the owner of certain premises situate in the City of New York, mortgaged them to an insurance company to secure \$2,000; the insurance company assigned the mortgage to the defendant, Sarah A. Marsh. Ridgway afterward conveyed the premises to the plaintiff, Brown, who subsequently, in October, 1865, entered into an agreement with plaintiff, Trimm, to convey the same to him. In 1861 the defendant, Sarah, commenced an action to foreclose this mortgage, making plaintiff, Brown, and others parties, and obtained judgment of foreclosure. The premises were sold under the judgment in 1862, and defendant, Sarah A. Marsh, became the purchaser, and received a sheriff's deed. Immediately after the sale she entered into possession of the premises, and she or the other defendant has ever since been in possession. In October, 1864, by an order of the Supreme Court, granted after due notice and hearing the parties interested, the foreclosure sale was set aside and declared null and void, and a resale was ordered, which never took place. In November, 1864, the defendant, Sarah A. Marsh, recovered a judgment against plaintiff, Brown, which was duly entered and docketed, and in 1865 she caused an execution to be issued upon said judgment to the Sheriff of New York, who, in May of the same year, sold all "the right, title and interest" of which the said Elizabeth C. Brown was seized or possessed in the said land, the said Sarah A. Marsh becoming the purchaser and taking the sheriff's certificate of sale. In September, 1865, she conveyed the said premises by deed to the other defendant, and in September, 1866, after the commencement of this suit, she also transferred to him the sheriff's certificate, and he soon after received the sheriff's deed. The defendant, William B. Marsh, had notice of all the facts when he

took his title, and was not a *bona fide* purchaser for value. Since the defendants went into possession of the premises they have assumed and claimed an absolute title, free from any right of redemption in the plaintiffs or either of them.

The plaintiffs commenced this action to redeem the said premises from the mortgage and judgment of foreclosure, and the principal defence relied on by the defendants was their title under the judgment and execution sale against plaintiff, Brown. The referee decided the same in favor of plaintiffs, holding that the execution sale, being made by the assignee of the mortgagee in possession, was null and void and conferred no title upon the purchaser.

EARL, C. The only legal proposition involved in this case, which we deem it important to consider, is whether a mortgagee of real estate in possession can cause the equity of redemption of the mortgagor to be sold on an execution and become the purchaser of the same, and, after obtaining the sheriff's deed, set up his title thus acquired against the claim of the mortgagor to redeem from the mortgage in an equitable action commenced by him for that purpose; or, to state the proposition in other words, has the owner of the equity of redemption of mortgaged premises, after default and after the owner of the mortgage has taken possession, such an interest in the premises as can be sold upon execution against him? If this question be answered in the affirmative, the decision of the General Term was right and must be affirmed.

The respective rights of the mortgagor and mortgagee in the land mortgaged have been the subject of much discussion, and it is impossible to reconcile all that learned judges and writers have said upon the subject. By the common law of England the legal estate was vested in the mortgagee, to be defeated by the performance of a condition subsequent, to wit, payment at the law day. In default of such payment, the title became absolute and irredeemable in the mortgagee. But, two centuries ago, courts of equity assumed jurisdiction to relieve mortgagors against forfeitures, and, thenceforth, in equity a mortgage has been regarded as a mere security, as creating an interest in the mortgaged premises of a personal nature, like that which the mortgagee has in the debt itself.

These equitable principles have had an increasing influence upon courts of law, and Chancellor Kent says that "the case of mortgages is one of the most splendid instances in the history of our jurisprudence of the triumph of equitable principles over technical

rules, and the homage which those principles have received by their adoption in the courts of law" (4 Kent's Com. 158).

The common-law rule, as modified by the equitable principles above alluded to, still prevails in England.¹ There the courts still hold that the legal title passes to the mortgagee, and becomes by default absolutely vested in him at law, and that the mortgagor has, after default, nothing but an equity of redemption to be enforced in a court of equity. After default the mortgagor can again become reinvested with the title to his land only by a reconveyance by the mortgagee. The same rule prevails in the New England States, and many of the other States of the Union. But this common-law rule has never, to its full extent, been adopted in this State. Here the mortgagor has, both in law and equity, been regarded as the owner of the fee, and the mortgage has been regarded as a mere chose in action, a mere security of a personal nature (*Waters v. Stewart*, 1 Caines' Cases in Error, 47; *Jackson v. Willard*, 4 Johns. 42; *Runyan v. Mersereau*, 11 id. 534; *Astor v. Hoyt*, 5 Wend. 603; *Packer v. Rochester & Syracuse Railroad Co.*, 17 N. Y. 283-295; *Kortright v. Cady*, 21 id. 343; *Power v. Lester*, 23 id. 527; *Merritt v. Bartholick*, 36 id. 44).

Prior to the Revised Statutes the mortgagee could maintain ejectment to recover the mortgaged premises. This right has been taken away (2 R. S. 312), and now the mortgagor, both before and after default, is entitled to the possession of the premises, of which he cannot be deprived without his consent, except by foreclosure. It is not disputed that before possession taken by the mortgagee the mortgagor has an interest in the real estate which can be sold upon execution; that his widow is entitled to dower; that he can convey and devise his interest as real estate; that at his death it descends to his heirs; that he has every attribute and right of an absolute owner of the real estate, subject to the lien of the mortgage, and that his title can be defeated only by foreclosure. It is not disputed that the mortgagee before possession taken has only a chose in action; that he holds the mortgage only as security for the debt; that he can sell the bond and mortgage by mere delivery as personal property; that at his death they pass to his personal representatives as a portion of his personal estate; that he has no such estate in the land as can be sold on execution, or as he can give his widow dower; and that he has no attribute of ownership

¹ In England to-day, a statute provides that the mortgagee's interest passes to the personal representative

and not to the heir. St. 44 & 45 Vict., Chap. 41, c. 41, § 30.

in the land. It was said by Judge James, in *Power v. Lester* (*supra*), that "a mortgage is a mere security, an incumbrance upon land. It gives the mortgagee no title or estate whatever. The mortgagor remains the owner, and may maintain trespass even against the mortgagee. A mortgage is but a chattel interest; it may be assigned by delivery, and cannot be seized and sold on an execution." Judge Pratt says, in *Packer v. The Rochester & Syracuse Railroad Company* (*supra*), that "a mortgagee has a mere chose in action, secured by a lien upon the land. Since the Revised Statutes there is no attribute left in the mortgagee, before foreclosure, upon which he can make any pretense for a claim of title. For the mere right, when he goes into possession by the consent of the mortgagor, to retain possession, is not an attribute of title. He would have the same right in case of a pledge."

At common law, payment or tender at the law day extinguished the lien of the mortgage and reinvested the mortgagor, without a reconveyance by the mortgagee, with his title. But tender or payment after the law day did not have this effect, and in such case a reconveyance was necessary; and such is still the rule in England and in many of the States of the Union. But it has always been the law of this State that payment or tender, at any time after the mortgage debt became due and before foreclosure, destroyed the lien of the mortgage and restored the mortgagor to his full title. As the mortgagee had no title, a reconveyance was not required by the law as expounded by our courts. So that here the term law day, which occupied such a prominent place in the early discussions as to mortgages, has no particular significance. The mortgagor has his "law day" until his title has been foreclosed by sale under the mortgage, and it is a misnomer in this State to call the mortgagor's right in the land, before or after default, an equity of redemption, a mere right to go into equity and redeem. This was a proper description of the mortgagor's right in the land according to the law as expounded in England. But in this State the interest of the mortgagor in the land is the same before and after default, and is a legal estate, with all the incidents and attributes of such an estate.

But it is claimed by the learned counsel for the appellants that the position of the mortgagee is materially changed when he gets possession. It is true, notwithstanding the provision of the Revised Statutes, which prohibits an action of ejectment by the mortgagee to obtain the possession of the mortgaged premises, that after he has lawfully obtained the possession he may retain it until

the debt secured by the mortgage has been paid. Before taking possession the mortgagee has no title in the lands. How can the mere possession change the title from the mortgagor to the mortgagee, or in any way diminish the estate of the one or enlarge the estate of the other? Before taking possession the mortgagee had a mere lien upon the real estate pledged for the security of his debt. After possession he has in his possession the property pledged as his security, the title remaining as it was before. The mortgagor's title is still a legal one, with all the incidents of a legal title subject to the pledge, and the mortgagee's interest is still a mere debt secured by the pledge. If the mortgagee should die in possession, the debt would still go to his personal representatives to be administered as personal estate, and the mortgagor's title would go to his heirs. Payment, or even tender, would destroy the mortgagee's right to retain possession, and would enable the mortgagor to maintain ejectment to recover possession. The mortgagee, in such case, so far from having any title, holds the land as the land of the mortgagor, and is liable to account to him for the rents and profits. Judge Comstock, in *Kortright v. Cady* (*supra*), says: "The mortgagee's right to bring ejectment, or, being in possession, to defend himself against an ejectment by the mortgagor, is but a right to recover or retain possession of the pledge for the purpose of paying the debt. Such a right is but the incident of the debt, and has no relation to a title or estate in the land. The notion that a mortgagee's possession, whether before or after default, enlarges his estate, or in any respect changes the simple relation of debtor and creditor between him and his mortgagor, rests upon no foundation. We may call it a just and lawful possession, like the possession of any other pledge, but where its object is accomplished it is neither just nor lawful for an instant longer."

I cannot doubt, therefore, that the mortgagor, after default, and after the mortgagee has taken possession, has such an estate in the land as can be sold upon execution. It is not necessary to decide whether, in such a case, the mortgagee has also such an estate in the land as can be sold upon execution, because, if he has, it does not follow that the mortgagor has not also such a right. They might each own an estate which could be sold. But I am of opinion that the mortgagee has no estate in the land which can be sold on execution. His interest is a mere chose in action, a debt secured by a pledge of real estate. His debt is not merged in the real estate by the possession. He has no interest in the real estate which he can

sell, or which can be sold separate from the debt. Such a sale would convey nothing. Whoever took the real estate from him would take it subject to the same liability as he was under to account for the rents and profits to the mortgagor. It has been decided that a transfer of the mortgage without the debt is a mere nullity (*Merritt v. Bartholick, supra*).

The fact that at the time of the execution sale, the defendants were in possession, claiming the absolute title, can make no difference, as land held adversely to the true owner can be sold upon execution against him (*Tuttle v. Jackson*, 6 Wend. 213; *Truax v. Thorn*, 2 Barb. 156).

I am, therefore, of the opinion that the title of the defendant under the execution sale was valid, and that the plaintiff had no right to redeem.

The order of the General Term must be affirmed, and judgment absolute rendered against the plaintiffs, with costs.^{1, 2}

TEFFT v. MUNSON

COURT OF APPEALS OF NEW YORK, 1875

(57 N. Y. 97)

THIS was an action to restrain defendants, loan commissioners for Washington County, from foreclosing a mortgage executed to them by Martin B. Perkins and wife.

On the 18th day of January, 1848, Gamaliel Perkins purchased of Cortland Howland certain lands in Washington County, which were conveyed to him by warranty deed recorded March 7, 1848, in the clerk's office in said county. Gamaliel Perkins, immediately after his purchase, let his son, Martin B. Perkins, into possession of the premises, who forged a deed of the land from his father to himself and placed it upon record in the clerk's office of said county, May 27, 1850. On the 1st day of October, 1850, Martin B. and

¹ The concurring opinion of REYNOLDS, C., as well as the elaborate dissenting opinion of GRAY, C., arguing for the legal character of the mortgage estate, especially after default and entry, is omitted.

This case represents the general rule in the United States. But see *Van Ness v. Hyatt*, 13 Pet. 294 (1839),

for the doctrine of a stranded jurisdiction.

² NEW YORK CODE CIV. PROC., § 1432. The judgment debtor's equity of redemption in real property mortgaged shall not be sold by virtue of an execution, issued upon a judgment recovered for the mortgage debt or any part thereof.

his wife executed a mortgage upon said land to the loan commissioners of said county, to secure the sum of \$1000 loaned to him. This mortgage contained covenants that Martin B. and his wife were lawfully seised of a good, sure, perfect, absolute and inde-feasible estate of inheritance in the premises, and that they were free and clear of and from all former and other gifts, grants, bargains, sales, liens, etc., and this mortgage was, on the day of its date, duly recorded in the book kept by the loan commissioners, as required by law. On the 23d of January, 1860, a deed of said lands, bearing date April 1, 1853, was recorded in the county clerk's office, which purported to be executed by Martin B. and wife to his father. On the 16th day of December, 1859, Gamaliel Perkins conveyed said land to Martin B., by deed recorded January 14, 1860. Until this conveyance from his father Martin B. had no title to the land, although he remained in possession of the same from 1848. On the 31st of January, 1867, Martin B., being still in possession of the lands, conveyed them to the plaintiff, who paid full value for the same without any actual notice of the mortgage to the loan commissioners. The deed to the plaintiff was recorded February 9, 1867.

The court below decided that plaintiff was not entitled to the relief sought, and directed a dismissal of the complaint. Judgment was perfected accordingly.

EARL, C. The plaintiff claims that the mortgage to the loan commissioners has no validity as against him, and that his deed has priority over it under the laws in reference to the registry of deeds and mortgages. It is a principle of law, not now open to doubt, that ordinarily, if one who has no title to lands, nevertheless makes a deed of conveyance, with warranty, and afterward himself purchases and receives the title, the same will vest immediately in his grantee who holds his deed with warranty as against such grantor by estoppel. In such case the estoppel is held to bind the land, and to create an estate and interest in it. The grantor in such case, being at the same time the warrantor of the title which he has assumed the right to convey, will not, in a court of justice, be heard to set up a title in himself against his own prior grant; he will not be heard to say that he had not the title at the date of the conveyance, or that it did not pass to his grantee in virtue of his deed (*Work v. Welland*, 13 N. H. 389; *Kimball v. Blaisdell*, 5 id. 533; *Somes v. Skinner*, 3 Pick. 52; *The Bank of Utica v. Mersereau*, 3 Barb. Ch. 528, 567; *Jackson v. Bull*, 1 Johns.

Cas. 81, 90; *White v. Patten*, 24 Pick. 324; *Pike v. Galvin*, 29 Maine, 183). And the doctrine, as will be seen by these authorities, is equally well settled that the estoppel binds not only the parties, but all privies in estate, privies in blood and privies in law, and in such case the title is treated as having been previously vested in the grantor, and as having passed immediately upon the execution of his deed, by way of estoppel. In this case Martin B. Perkins conveyed the lands to the loan commissioners, by mortgage with warranty of title, and thereby became estopped from disputing that, at the date of the mortgage, he had the title and conveyed it, and this estoppel applied equally to the plaintiff to whom he made a subsequent conveyance, by deed, after he obtained the title from his father, and who thus claimed to be his privy in estate. The plaintiff was estopped from denying that his grantor, Martin B. Perkins, had the title to the land at the date of the mortgage, and he must, therefore, for every purpose as against the plaintiff, be treated as having the title to the land at that date.

I, therefore, can see no difficulty in this case, growing out of the law as to the registry of conveyances. Martin B. Perkins, having title, made the mortgage which was duly recorded. He then conveyed to his father and the deed was recorded. His father then conveyed to him and the deed was recorded. He then conveyed to the plaintiff and his deed was recorded. Thus the title and record of the mortgage were prior to the title and record of the deed to plaintiff, and the priority claimed by plaintiff cannot be allowed. Assuming it to be the rule that the record of a conveyance made by one having no title, is, ordinarily a nullity, and constructive notice to no one, the plaintiff cannot avail himself of this rule, as he is estopped from denying that the mortgagor had the title at the date of the mortgage.

I am, therefore, of opinion that the judgment should be affirmed, with costs.

For affirmance, Earl, Gray and Johnson, CC.

For reversal, Lott, Ch. C., and Reynolds, C.¹

*Judgment affirmed.*²

¹ The dissenting opinion of REYNOLDS, C., is omitted.

² See also, *Northrup v. Ackerman*, 84 N. J. Eq. 117 (1914).

DONOVAN v. TWIST

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD
DEPARTMENT, 1903

(85 App. Div. 130, 83 N. Y. Supp. 76)

APPEAL by the defendant, Salem Twist, from a judgment of the County Court of Tompkins county, entered in the office of the clerk of the county of Tompkins on the 6th day of January, 1903, upon the decision of the court rendered after a trial before the court without a jury.

This action is brought to foreclose a mortgage given by William W. Smith upon the 23d day of March, 1882, to plaintiff to secure a bond wherein said mortgagor became bound to pay to the plaintiff the sum of \$250. This mortgage was recorded in the Tompkins county clerk's office on the 24th day of March, 1882. At the time of the giving of this mortgage the said William W. Smith had no title to the property. Upon the 27th day of March, 1882, however, he received a deed of the property from one William N. Noble, which deed was recorded upon the said twenty-seventh day of March. Thereafter, the said William W. Smith died, and upon the 7th day of December, 1901, the defendant Salem Twist received a conveyance of the property from the only heir at law of William W. Smith. This conveyance was received for a valuable consideration and without actual notice of the plaintiff's claim. The trial court, after having found these facts, found as a conclusion of law that the defendant Twist took the premises subject to the lien of the plaintiff's mortgage, and judgment was directed for a sale of the premises to pay said mortgage. From this judgment the defendant Twist has appealed.

SMITH, J. The mortgage sought to be foreclosed was given by the mortgagor before he had acquired title to the premises described therein, and without any covenant of seizin or warranty. The rule of law is, I think, clearly established, that such a mortgage has no greater effect than a quitclaim deed, and is not operative upon a title subsequently acquired. (*Jackson v. Littell*, 56 N. Y. 108; *Sparrow v. Kingman*, 1 *id.* 256; *M'Crackin v. Wright*, 14 Johns. 193; *Jackson v. Hubble*, 1 Cow. 613.) It may be that if this mortgage had contained a warranty of title or covenants of seizin, its record would have been constructive notice to the de-

defendant although its date of record was prior to the date of the deed to the mortgagor. (See *Tefft v. Munson*, 57 N. Y. 97.) In the cases cited upon the respondent's brief the mortgages held valid as liens upon property subsequently acquired were all mortgages in which there was either a warranty or covenant by reason of which the mortgagor and his privies were estopped from denying the title which he had covenanted he possessed. In this mortgage, however, there is no covenant either of seizin or of warranty and no statement by which the mortgagor can be estopped from claiming that his title was subsequently acquired. No estoppel, therefore, can be urged against this defendant grantee, who took at least the rights which the mortgagor had at the time of his grant.

The judgment should, therefore, be reversed.

*All concur.*¹

RECTOR CHRIST CHURCH v. MACK

COURT OF APPEALS OF NEW YORK, 1883

(93 N. Y. 488)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made October 28, 1881, which reversed a judgment in favor of defendant Rhoda E. Mack, entered upon a decision of the court on trial at Special Term, and directed judgment for plaintiff for the relief demanded in the complaint. (Reported below, 25 Hun, 418.)

This action was brought to restrain defendants from obstructing the light and air from the windows of plaintiff's church edifice, adjoining a lot owned by said defendant, Rhoda E. Mack. Plaintiff was formerly owner of said lot, which was subject to a mortgage given to one Bell. It conveyed the same to defendant, John Mack, subject to the mortgage, which the grantee assumed and agreed to pay. By the deed an easement was reserved of light and air to the grantor's church so long as its premises were used for church purposes. Mack conveyed to a third person, who, on the same day, conveyed to Rhoda E., wife of said John Mack. Her deed was made subject to the Bell mortgage, but contained no assumption of the same by her. The holder of the mortgage, at the request of defendants herein, foreclosed the mortgage by suit; plaintiff

¹ *Accord*, *Donovan v. Twist*, 105 (1905); *Mayer v. Burr*, 133 App. Div. App. Div. 171, 93 N. Y. Supp. 990 604, 607 (1909).

was made a party defendant therein. Judgment of foreclosure in the ordinary form was entered, and upon the sale under it Mrs. Mack became the purchaser and received the referee's deed. Mrs. Mack thereafter erected a fence upon her lot, which cut off the light from the basement windows of plaintiff's church.

FINCH, J. It is conceded that a purchase under the foreclosure of the Bell mortgage would have given to a stranger to the title an ownership discharged of the plaintiff's easement. That the same result attends the purchase by Mrs. Mack, notwithstanding her relation to the property, follows from the reason upon which the conceded rule is founded. The statute provides that the deed given in pursuance of a sale on foreclosure shall vest in the purchaser "the same estate (and no other or greater) that would have vested in the mortgagee if the equity of redemption had been foreclosed," and further declares that such deeds shall be as valid as if executed by the mortgagor and mortgagee. The construction to be put upon these two provisions was early settled in this court (*Brainard v. Cooper*, 10 N. Y. 358; *Packer v. The Roch. & Syracuse R. R. Co.*, 17 *id.* 287). In the last of these cases it was said that where legal title is concerned, a mortgage, which for many other purposes is a mere chose in action, is a conveyance of the land; that the interest remaining in the mortgagor is an equity, and that the foreclosure cuts off and extinguishes that equity, and leaves the title conveyed by the mortgage. It was added that such was precisely the effect of a strict foreclosure, and that in construing the statute its two clauses were to be read in harmony. It was, therefore, decided that when the act says the master's deed "shall have the same validity as if executed by the mortgagor, it is not to be taken that the purchaser is to be considered as holding under the mortgagor by title subsequent to the mortgage in a sense which would subject him to the effect of the mortgagor's acts intermediate the mortgage and the foreclosure." While it is clearly the modern doctrine that the mortgagee has by virtue of his mortgage no estate in or title to the land, or the right of possession before or after the mortgage debt becomes due (*Ten Eyck v. Craig*, 62 N. Y. 421), and only acquires such title by purchase upon the foreclosure sale, yet the character and extent of his title so acquired is described in the statute by a reference to the old rule and the old practice, when the mortgagor's right could be fitly termed an equity of redemption which could be foreclosed, leaving an absolute estate in the mortgagee. The effect of the foreclosure deed, therefore, as determined

by the statute, is to vest in the purchaser the entire interest and estate of mortgagor and mortgagee as it existed at the date of the mortgage, and unaffected by the subsequent incumbrances and conveyances of the mortgagor. And thus, while the plaintiff corporation held title to the Mack lot, they held it subject to the Bell mortgage and to the absolute title into which that mortgage might ripen by a foreclosure and sale. When they sold to Mack, reserving an easement in the lot for light and air to their adjoining windows, they held their easement, and Mack held his ownership, still subject to the Bell mortgage and the absolute title into which it might be turned. Mack had assumed the payment of the Bell mortgage, but conveyed through a third person to his wife, subject to that mortgage, but without any liability for its payment assumed by her. Upon its foreclosure she became the purchaser and took the deed. That vested in her, under the statute provision, the title of the mortgagor and mortgagee unaffected by the intermediate acts of the mortgagor and those succeeding to his interest, unless there be something in her position which subjects her to a different rule.

The statute allowed her to be a purchaser, and in determining the effect of the foreclosure deed its terms draw no distinction among purchasers. It does not discriminate. Whoever may lawfully purchase becomes the purchaser whose title is described and determined, and we have no warrant in the facts to take Mrs. Mack out of the statutory protection.

The argument of the General Term and of the learned counsel for the respondent on this appeal were both aimed at the result of converting her purchase into a mere payment and discharge of the mortgage lien, and her deed into a release of the incumbrance. The General Term reached the result by a disregard of the first clause of the statute declaring the effect of the deed, and what seems to us a misinterpretation of the second clause. In brief, the reasoning was that the deed was to be equivalent to one made by the mortgagor and mortgagee; that the mortgagor had already conveyed and his title, incumbered by an after constituted easement, had reached Mrs. Mack; that she could not be said to purchase what she already had; that so her deed was only equivalent to one made by the mortgagee, and he having no title, but merely a lien, the foreclosure deed operated only as a release to Mrs. Mack, however it might operate as to a stranger. We deem this reasoning defective in two respects. It construes the statute to transfer the mortgagor's title as it stood, not at the date of his mortgage, but burdened with

its after incumbrances and limitations, imposed by him or his grantees; and it assumes what is not true, that Mrs. Mack already had the entire title of the mortgagor, and so could take nothing from him but only the right of the mortgagee. The mortgagor had the absolute title incumbered only by the mortgage. That title he transferred to the church, but when the latter conveyed to Mack it reserved an easement or servitude, and so parted with less than it received from the mortgagor. This title Mrs. Mack took, and therefore did not get the entire interest which the mortgagor himself had. There was something which she had not got, which by a foreclosure of the Bell mortgage would pass, and which it was possible for her to purchase.

A further ground is stated which is based upon a theory that Mrs. Mack by virtue of her ownership of the lot came under some obligation to pay off the mortgage, and so could not in equity assert a title founded upon a breach of that obligation. Cases are cited in other States which hold that the mortgagor owes to his mortgagee the duty of paying taxes upon the land and cannot by neglecting their payment and causing a sale and then becoming a purchaser, cut off the lien of the mortgagee. If the purchase had been made by Mr. Mack, who had assumed the payment of the mortgage, the question would have arisen. But Mrs. Mack owed no duty of payment either to the mortgagee or to the plaintiff. She assumed no such obligation. She violated no duty and incurred no personal liability by omitting to pay off the incumbrance. It was her right and privilege not to do so, and in the omission she did no wrong of which either party could lawfully complain. She had the right to leave the mortgagee to his remedy, and when he asserted it, the law allowed her to become the purchaser, and made no distinction between her rights and those of a stranger to the title.

It was urged that this view of the case left the plaintiff without any power to save its easement, since on the sale Mrs. Mack could safely outbid all others and beyond the mortgage debt. But the plaintiff should not have waited until the sale. When brought into court as a defendant, and certain to be bound by the decree, it should have sought to modify the decree and, showing the peril of its easement and offering to bid the full amount of the mortgage debt and costs upon a sale subject to the servitude, it should have asked that the sale be so made. The mortgagee could not object since his debt would be paid in full and he had no greater right; and Mrs. Mack could have asserted no equity to have the sale so

made as to free her from the easement. But when no limitation or condition is imposed by the decree, and no duty of payment rests on the purchaser, the statute determines the estate which passes by the foreclosure deed.

The judgment of the General Term should be reversed and that of the Special Term affirmed, with costs.

All concur.

*Judgment accordingly.*¹

CHAPPEL v. JARDINE

SUPREME COURT OF ERRORS OF CONNECTICUT, 1884

(51 Conn. 64)

SUIT for a foreclosure; brought to the Superior Court. The defendants demurred to the complaint; the court (Andrews, J.) overruled the demurrer and passed a decree of foreclosure. The defendants appealed to this court. The case is sufficiently stated in the opinion.

PARK, C. J. This is a suit for the foreclosure of certain mortgaged premises, constituting an island, known as Ram Island, in Long Island Sound. The complaint alleges that the land mortgaged at the time the deed was given lay in the town of Southhold, Suffolk County, in the State of New York, and it is averred that the mortgage was recorded in the office of the clerk of Suffolk County in that State. It is further alleged that Ram Island, by the recent establishment of the boundary line between the State of New York and this State, has become a part of the town of Stonington in this State. The complaint is demurred to, so that the averment stands admitted that the island was, when the mortgage was made, a part of the State of New York.

We have heretofore held (*Elphick v. Hoffman*, 49 Conn. 331) that the boundary agreed upon by the joint commission of the two States and established by the legislative acceptance of both States, was to be regarded as presumably a designation and establishment of the pre-existing boundary line which had become lost, and not as

¹ The principal case was followed in *National Bank v. Levy*, 127 N. Y. 549 (1891), where BRADLEY, J., said at p. 553: "And when the equity of

redemption is foreclosed the purchaser takes the estate the mortgagor had at the time he gave the mortgage."

the establishment of a new line, leaving the matter open to proof in special cases. If we should apply that rule here, and consider the island in question as having been legally a part of this State when the mortgage was made, we should at once encounter another question of a serious nature. There can be no question that whatever has been the *de jure* jurisdiction over the island, it has been for many years within the *de facto* jurisdiction of the State of New York; and we should be compelled to determine the legal effect upon this mortgage of that *de facto* jurisdiction.

We have thought it as well, therefore, to take the case as the parties have themselves presented it, the plaintiff by the averments of his complaint and the defendants by the admissions of their demurrer, and regard the island in question as having been within the State of New York when the mortgage was made, and afterwards brought within this State by the establishment of the boundary line. Indeed, as the proceeding is in error, we cannot properly govern ourselves by anything but the record as it comes before us. And in treating the island as within the State of New York when the mortgage was made we are regarding the contract and the rights of the parties under it, precisely as they themselves understood them at the time.

The mortgaged premises having been in the State of New York when the mortgage was made, it is of course to be governed in its construction and effect by the laws of that State then in force. In *McCormick v. Sullivant*, 10 Wheat. 192, the court say: "It is an acknowledged principle of law that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another." The same doctrine is held in *United States v. Crosby*, 7 Cranch, 115; *Kerr v. Moon*, 9 Wheat. 565; *Darby v. Mayer*, 10 *id.* 465, and in many other cases. Indeed the doctrine is unquestioned law everywhere.

Now, according to the laws of the State of New York then and still in force, a mortgage of real estate creates a mere chose in action, a pledge, a security for the debt.¹ It conveys no title to the property. The claim of the mortgagee is a mere chattel interest. He has no right to the possession of the property. The title and seisin remain in the mortgagor, and he can maintain trespass and ejectment against the mortgagee, if he takes possession of the property without the consent of the mortgagor.

¹ For the New York view, see also, *Barnes v. Southfield Beach Co.*, 202 N. Y. 301 (1911).

It follows, therefore, that while the land in question remained in the State of New York it was incumbered by a mortgage of this character; and when it came into this State it bore with it the same burden precisely. There was nothing in the change of jurisdiction that could affect the contract of mortgage that had been made between the parties. The title to the property continued to remain in the mortgagor, and it remains in him still. This is clear. The laws of this State could not make a new contract for the parties or add to one already made. They had to take the contract as they found it.

Now it is clear that there is no remedy by way of foreclosure known to our law which is adapted or appropriate to giving relief on a mortgage of this character. Our remedy is adapted to a mortgage deed which conveys the title of the property to the mortgagee, and when the law day has passed the forfeiture, stated in the deed, becomes absolute at law, and vests a full and complete title in the mortgagee, with the exception of the equitable right of redemption, which still remains in the mortgagor. The object of the decree of foreclosure is to extinguish this right of redemption if the mortgage debt is not paid by a specified time. The decree acts upon this right only. It conveys nothing to and decrees nothing in the mortgagee if the debt is not paid. After the law day has passed the right of redemption becomes a mere cloud on the title the mortgagee then has, and when it is removed his title becomes clear and perfect (*Phelps v. Sage*, 2 Day, 151; *Roath v. Smith*, 5 Conn. 136; *Chamberlin v. Thompson*, 10 id. 244; *Porter v. Seeley*, 13 id. 564; *Smith v. Vincent*, 15 id. 1; *Doton v. Russell*, 17 id. 146; *Cross v. Robinson*, 21 id. 379; *Dudley v. Caldwell*, 19 id. 218; *Cohell v. Warner*, 36 id. 224).

What effect would such a decree produce upon a mortgage like the one under consideration, where the legal title remains in the mortgagor, and nothing but a pledgee's interest is in the mortgagee, even after the debt becomes due? It could only extinguish the right of redemption, if it could do that. It could not give the mortgagee the right of possession of the property, for the mortgagor has still the legal title, which carries with it the right of possession. It would require another proceeding in equity, to say the least, to dispossess him of that title, and vest it in the mortgagee. Hence it is clear that full redress cannot be given the plaintiff in this proceeding.

But the plaintiff has a lien on the property in the nature of a pledge to secure payment of the mortgage debt. And although our

remedy of strict foreclosure may not be adapted to give redress to the plaintiff through the medium of such a lien, still a court of equity can devise a mode that will be appropriate; for it would be strange if a lawful lien upon property to secure a debt could not be enforced according to its tenor by a court of chancery. It is said that every wrong has its remedy; so it may be said that every case requiring equitable relief has its corresponding mode of redress. We have no doubt that a court of equity has the power to subject the property in question to the payment of this debt, upon a proper complaint adapted to the purpose. When personal property is pledged to secure the payment of a debt, it may be taken and sold, that payment may be made, after giving the pledgor a reasonable opportunity for redemption. So here, we think a similar course might be taken with this property. Such a course would fall in with the original intent of the parties, and with the civil code and mode of procedure of the State of New York. Modes of redress in that State have of course no force in this State, but such a mode of procedure seems to be adapted to a case of this character.

And we further think that on an amended complaint, setting forth all the essential facts, and praying that if there shall be a default in redeeming the property during such time as the court shall allow for redemption, then the right of redemption shall be forever foreclosed, and the legal title and possession of the property be decreed in the mortgagee, such course might be taken.

We think either of the modes suggested might be pursued; but inasmuch as the course which has been taken leaves the legal title and possession of the property in the mortgagor, we think the court erred in holding the complaint sufficient, and in passing the decree thereon.

There is error in the judgment appealed from, and it is reversed, and the case remanded.

In the opinion the other judges concurred.

DOLLIVER v. ST. JOSEPH INSURANCE Co., 128 Mass. 315 (1880). A mortgagor of real property insured the same under a policy, wherein he represented himself as having "the entire, unconditional and sole ownership" of the property. It was held that there was no misrepresentation.

SOULE, J. It has long been settled in this Commonwealth that, as to all the world except the mortgagee, a mortgagor is the owner of the mortgaged lands, at least till the mortgagee has entered for

possession (*Willington v. Gale*, 7 Mass. 138; *Waltham Bank v. Waltham*, 10 Met. 334; *White v. Whitney*, 3 Met. 81; *Ever v. Hobbs*, 5 Met. 1; *Henry's case*, 4 Cush. 257; *Howard v. Robinson*, 5 Cush. 119; *Buffum v. Bowditch Ins. Co.*, 10 Cush. 540; *Farnsworth v. Boston*, 126 Mass. 1). This being the law, and the mortgagees not being in possession of the premises, the plaintiff's assignor might well be described in a policy of insurance as the owner of the property insured; and, inasmuch as his estate was in fee simple, not an estate for life, and not a base, qualified or conditional fee, it might well be described as the entire and unconditional ownership; and as he had no joint tenant nor tenant in common, his estate was well described as the sole ownership. As between him and the defendant, the mortgages and the lease were mere incumbrances on his title, not affecting its character as entire, and not changing it from an absolute to a conditional estate or ownership. Even as between him and the mortgagees, the mortgagees' estate was the conditional one, determinable by satisfaction of the condition set out in the mortgage deed. There was no joint tenancy nor tenancy in common of the mortgagor and the mortgagees. All the characteristics of such tenancies are lacking in their relations to the property.¹

¹ Compare *Blaney v. Bearce*, 2 Greenl. (Me.) 132 (1822).

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CHAPTER I. (*Continued*)

SECTION II.—POSSESSION

KEECH *v.* HALL

COURT OF KING'S BENCH, 1778

(1 *Douglas*, 21)

EJECTMENT tried at Guildhall before Buller, Justice, and verdict for the plaintiff. After a motion for a new trial, or leave to enter up judgment of nonsuit, and cause shown, the court took time to consider; and now Lord Mansfield stated the case and gave the opinion of the court, as follows:

LORD MANSFIELD. This is an ejectment brought for a warehouse in the city by a mortgagee against a lessee under a lease in writing for seven years, made after the date of the mortgage by the mortgagor, who had continued in possession. The lease was at a rack-rent. The mortgagee had no notice of the lease, nor the lessee any notice of the mortgage. The defendant offered to attorn to the mortgagee before the ejectment was brought. The plaintiff is willing to suffer the defendant to redeem. There was no notice to quit; so that, though the written lease should be bad, if the lessee is to be considered as tenant from year to year, the plaintiff must fail in this action. The question, therefore, for the court to decide is whether, by the agreement understood between mortgagors and mortgagees, which is that the latter shall receive interest and the former keep possession, the mortgagee has given an implied authority to the mortgagor to let from year to year at a rack-rent; or whether he may not treat the defendant as a trespasser, disseisor and wrongdoer.

No case has been cited where this question has been agitated, much less decided. The only case at all like the present, is one that was tried before me on the home circuit (*Belchier v. Collins*); but there the mortgagee was privy to the lease, and afterwards, by a knavish trick, wanted to turn the tenant out. I do not

wonder that such a case has not occurred before. Where the lease is not a beneficial lease, it is for the interest of the mortgagee to continue the tenant; and where it is, the tenant may put himself in the place of the mortgagor, and either redeem himself or get a friend to do it. The idea that the question may be more proper for a court of equity goes upon a mistake. It emphatically belongs to a court of law, in opposition to a court of equity; for a lessee at a rack-rent is a purchaser for a valuable consideration, and in every case between purchasers for a valuable consideration, a court of equity must follow, not lead, the law. On full consideration, we are all clearly of opinion that there is no inference of fraud or consent against the mortgagee to prevent him from considering the lessee as a wrongdoer. It is rightly admitted that if the mortgagee had encouraged the tenant to lay out money he could not maintain this action; but here the question turns upon the agreement between the mortgagor and mortgagee; when the mortgagor is left in possession, the true inference to be drawn is an agreement that he shall possess the premises at will in the strictest sense, and, therefore, no notice is ever given him to quit, and he is not even entitled to reap the crop, as other tenants at will are, because all is liable to the debt, on payment of which the mortgagee's title ceases. The mortgagor has no power, express or implied, to let leases not subject to every circumstance of the mortgage. If by implication the mortgagor had such a power, it must go to a great extent, to leases where a fine is taken on a renewal for lives. The tenant stands exactly in the situation of the mortgagor. The possession of the mortgagor cannot be considered as holding out a false appearance. It does not induce a belief that there is no mortgage, for it is the nature of the transaction that the mortgagor shall continue in possession. Whoever wants to be secure when he takes a lease should inquire after and examine the title deeds. In practice, indeed (especially in the case of great estates) that is not often done, because the tenant relies on the honour of his landlord; but whenever one of two innocent persons must be a loser, the rule is *qui prior est tempore, potior est jure*. If one must suffer, it is he who has not used due diligence in looking into the title.

It was said at the bar that if the plaintiff, in a case like this, can recover, he will also be entitled to the *mesne* profits from the tenant in an action of trespass, which would be a manifest hardship and injustice, as the tenant would then pay the rent twice. I give no opinion on that point; but there may be a distinction, for

the mortgagor may be considered as receiving the rents in order to pay the interest by an implied authority from the mortgagee, till he determine his will. As to the lessee's right to reap the crop which he may have sown previous to the determination of the will of the mortgagee, that point does not arise in this case, the ejectment being for a warehouse; but, however that may be, it could be no bar to the mortgagee's recovering in ejectment. It would only give the lessee a right of ingress and egress to take the crop; as to which, with regard to tenants at will, the text of Littleton is clear.¹ We are all clearly of opinion that the plaintiff is entitled to judgment.

The rule discharged.

MOSS v. GALLIMORE

COURT OF KING'S BENCH, 1779

(1 Douglas, 279)

In an action of trespass, which was tried before Nares, Justice, at the last Assizes for Staffordshire, on not guilty pleaded, a verdict was found for the plaintiff, subject to the opinion of the court on a case reserved. The case stated as follows: One Harrison, being seised in fee, on the 1st of January, 1772, demised certain premises to the plaintiff for twenty years, at the rent of £40, payable yearly on the 12th of May; and, in May, 1772, he mortgaged the same premises, in fee, to the defendant, Mrs. Gallimore. Moss continued in possession from the date of the lease, and paid his rent regularly to the mortgagor, all but £28 which was due on and before the month of November, 1778, when the mortgagor became a bankrupt, being, at the time, indebted to the mortgagee in more than that sum for interest on the mortgage. On the 3d of January, 1779, one Harwar went to the plaintiff, on behalf of Gallimore, shewed him the mortgage deed, and demanded for him the rent then remaining unpaid. This was the first demand that Gallimore made of the rent. The plaintiff told Harwar that the assignees of Harrison had demanded it before, viz. on the 31st of December; but, when Harwar said that Gallimore would distrain for it if it was not paid, he said he had some cattle to sell, and hoped she would not distrain till they were sold, when he would pay it. The plaintiff not having paid according to this undertaking, the other

¹ Lit., § 68. See also Co. Lit., 55 a, 55 b.

defendant, by order of Gallimore, entered and distrained for the rent, and thereupon gave a written notice of such distress to the plaintiff, in the following words: "Take notice, that I have this day seized and distrained, &c. by virtue of an authority, &c. for the sum of £28, being rent, and arrears of rent, due to the said Ester Gallimore, at Michaelmas last past, for, &c. and unless you pay the said rent, &c." He accordingly sold cattle and goods to the amount of £22 2s. The question stated for the opinion of the court was Whether, under all the circumstances, the distress could be justified?

LORD MANSFIELD. I think this case, in its consequences, very material. It is the case of lands let for years and afterwards mortgaged, and considerable doubts, in such cases, have arisen in respect to the mortgagee, when the tenant colludes with the mortgagor; for, the lease protecting the possession of such a tenant, he cannot be turned out by the mortgagee. Of late years the courts have gone so far as to permit the mortgagee to proceed by ejectment, if he has given notice to the tenant that he does not intend to disturb his possession, but only requires the rent to be paid to him, and not to the mortgagor. This, however, is entangled with difficulties. The question here is, whether the mortgagee was or was not entitled to the rent in arrear. Before the statute of Queen Anne, attornment was necessary, on the principle of notice to the tenant; but, when it took place, it certainly had relation back to the grant and, like other relative acts, they were to be taken together. Thus livery of seisin, though made afterwards, relates to the time of the feoffment. Since the statute, the conveyance is complete without attornment, but there is a provision, that the tenant shall not be prejudiced for any act done by him, as holding under the grantor, till he has had notice of the deed. Therefore the payment of rent before such notice is good. With this protection he is to be considered, by force of the statute, as having attorned at the time of the execution of the grant; and, here, the tenant has suffered no injury. No rent has been demanded which was paid before he knew of the mortgage. He had the rent in question still in his hands, and was bound to pay it according to the legal title. But, having notice from the assignees and also from the mortgagee, he dares to prefer the former, or keeps both parties at arm's length. In the case of execution it is uniformly held that if you act after notice, you do it at your peril. He did not offer to pay one of the parties on receiv-

ing an indemnity. As between the assignees and the mortgagee, let us see who is entitled to the rent. The assignees stand exactly in the place of the bankrupt. Now, a mortgagor is not properly tenant at will to the mortgagee, for he is not to pay him rent. He is so only *quodam modo*. Nothing is more apt to confound than a simile. When the court, or counsel, call a mortgagor a tenant at will, it is barely a comparison. He is like a tenant at will. The mortgagor receives the rent by a tacit agreement with the mortgagee, but the mortgagee may put an end to this agreement when he pleases. He has the legal title to the rent, and the tenant, in the present case, cannot be damnified, for the mortgagor can never oblige him to pay over again the rent, which has been levied by this distress. I therefore think the distress well justified; and I consider this remedy as a very proper additional advantage to mortgagees, to prevent collusion between the tenant and the mortgagor.

ASHHURST, Justice. The statute of Queen Anne has rendered attornment unnecessary in all cases, and the only question here arises upon the circumstance of the notice of the mortgage not having been given till after the rent distrained for became due. Where the mortgagor is himself the occupier of the estate, he may be considered as tenant at will; but he cannot be so considered, if there is an undertenant; for there can be no such thing as an undertenant to a tenant at will. The demise itself would amount to a determination of the will. There being in this case a tenant in possession, the mortgagor is, therefore, only a receiver of the rent for the mortgagee, who may, at any time, countermand the implied authority, by giving notice not to pay the rent to him any longer.

BULLER, Justice. There is in this case a plea of the general issue, which is given by statute (11 Geo. 2, c. 19, § 21), but if the justification appeared upon the record in a special plea, the distress must be held to be legal. Before the act of Queen Anne, in a special justification, attornment must have been pleaded. But since that statute, it is never averred in a declaration in covenant, nor pleaded in an avowry. In the case of *Keech v. Hall*, referred to by Mr. Wood, the court did not consider the mortgagor as tenant at will to all purposes. If my memory do not fail me, my lord distinguished mortgagors from tenants at will in a very material circumstance, namely, that a mortgagor would not be entitled to emble-

ments. Expressions used in particular cases are to be understood with relation to the subject-matter then before the court.

The *postea* to be delivered to the defendants.¹

JONES v. CLARK

SUPREME COURT OF JUDICATURE OF NEW YORK, 1822

(20 Johns. 51)

IN error, to the Court of Common Pleas, or Mayor's Court, of Albany.

The defendants in error brought an action of assumpsit against the plaintiff in error, in the court below, to recover one quarter's rent of a house and lot, formerly owned by Gilbert Stewart, due August 1, 1821. The defendant pleaded the general issue. At the trial, the plaintiffs gave in evidence a written lease of the premises from them to the defendant and Maltby Howel, for one

¹ In *Birch v. Wright*, 1 T. R. 378, this case was confirmed by the court, and fully re-stated by BULLER, J., who declared by Lord Mansfield's desire that his Lordship continued satisfied with the decision. In that case it was determined that the grantee of a reversion, in trust for payment of an annuity, might recover in an action for use and occupation against a tenant from year to year, who came in under the grantor before the grant, all the rent unpaid in his hands at the time of notice of the grant.—Rep.

Thunder v. Belcher, 3 East, 449 (1803), *accord*. See also, *Partridge v. Bere*, 5 B. & Ald. 604 (1882).

In *King v. Housatonic R. Co.*, 45 Conn. 226 (1877), Hovey, J., said: "Where the grant is by way of mortgage, the mortgagee, though entitled to the rents as incident to the reversion, may take them or not at his election. If he elects not to take them, as he generally does so long as his interest is paid, he may

forbear to give notice to the tenant, and in that case the mortgagor is authorised to collect the rents and appropriate them to his own use. But if the mortgagee elects to take the rents and gives notice of his election to the tenant, he then becomes entitled to all the rents accruing after the execution of the mortgage and in arrear and unpaid at the time of the notice, as well as to those which accrue afterwards. But the rents in arrear at the time the mortgage was executed belong to the mortgagor. The leading authority for this doctrine is the case of *Moss v. Gallimore*, 1 Doug. 279." See also, *Baldwin v. Walker*, 21 Conn. 168 (1851); *Abbott v. Hanson*, 24 N. J. Law, 493 (1854); *Russell v. Allen*, 2 Allen (Mass.), 42 (1861), and *Mirick v. Hoppin*, 118 Mass. 582 (1875), *accord*. So, after forfeiture, *McKircher v. Hawley*, 16 Johns. (N. Y.) 289 (1819), *semble*. But compare *Myers v. White*, 1 Rawle (Penn.), 355 (1829) (*semble*), *contra*.

year, ending May 1, 1821, for the rent of 400 dollars, payable quarterly.

M. Howel, a witness for the plaintiff, testified that the defendant took possession of the premises, under the said lease, at its commencement, on the first of May, 1820, and has since continued in occupation thereof. The witness, in answer to a question, which was objected to by the defendant's counsel, but allowed by the court, and the point reserved, said that he joined in the execution of the lease merely as surety for the payment of the rent by the defendant, Jones, and had never occupied the premises. It was proved that, at the expiration of the term, Jones, without the intervention or concurrence of Howel, agreed with Clark, one of the plaintiffs below, to take the premises for another year, at the same rent.

The defendant below gave in evidence a bond of Gilbert Stewart to R. Pratt and W. Durant, for 6000 dollars, payable on the 4th of February, 1821, and a mortgage to them of the premises, dated February 4, 1819, duly recorded; and also a lease from Pratt and Durant, to the defendant, of the premises in question, dated February 7, 1821, for one year, commencing May 1, 1821, at the yearly rent of 400 dollars; which lease contained a clause, by which the lessors engaged to indemnify the defendant against all claims for rent by any other persons; and also a general assignment by Gilbert Stewart of all his property, including the premises in question, to the plaintiffs below, dated August, 1819, in trust for the benefit of his creditors, as specified in the assignment.

A verdict was taken by consent, for the plaintiffs below, for one quarter's rent, subject to the opinion of the court, &c., on which a judgment was, afterwards, rendered by the court below.

SPENCER, Ch. J., delivered the opinion of the court. The points made by the counsel for the plaintiff in error, are, 1. That there was no sufficient evidence that Jones held under Clark and Stewart.

2. That Howel was an incompetent witness.

3. That the matters shown by the defendant below were a complete defence.

The first and second points may, at once, be disposed of. There was complete evidence of the hiring of the premises by Jones, for the second year. Howel was a competent witness to show that he had no beneficial interest in the expired lease, though the fact itself was no wise material. The cause depends on the third point; and it presents this question, whether a tenant of the mortgagor in

possession, and who became such subsequent to the giving the mortgage, can, in a suit by his landlord, the mortgagor, set up as a legal defence, that after the mortgage became forfeited he attorned to the mortgagee and took a lease from him, during the continuance of the lease from the mortgagor. This case has probably been decided in the court below on the authority of the case of *M'Kircher v. Hawley*, 16 Johns. Rep. 289. The principle decided in that case was this: that a mortgagee could not distrain for rent becoming due under a lease made by the mortgagor subsequent to giving the mortgage, because there was no privity of estate or contract between the mortgagee and such a tenant; and we held that, to enable a party to distrain for rent, he must have a concurrent right to maintain an action for the rent; and if there was no privity of contract or estate, an action could not be maintained.

a { When the plaintiff in error attorned to the mortgagees and took a lease from them, their title to enter under their mortgage was complete; for, the day of payment having passed, the condition was broken, and the estate of the mortgagees was absolute at law. This case, then, presents a very different question from the one decided in *M'Kircher v. Hawley*. There the point was whether the mortgagee could distrain, or, in effect, sue for the rent. Here it is whether the tenant of the mortgagor could not, by his own act and consent, become the future tenant of the mortgagees, without any disloyalty to the mortgagor. "At common law," says Mr. Butler (in note 272 to Co. Litt. 309 a), "attornment signified only the consent of the tenant to the grant of the seignior; or, in other words, his consent to become the tenant of the new lord." He goes on to show the operation of the statute of *quia emptores*, and the statute of uses, and the statute of wills, and observes that the necessity and efficacy of attornments have been almost totally taken away by the statutes of 4 and 5 Anne, c. 16, and 11 George II, c. 19. These two statutes have been re-enacted here. The former does not relate to this case, but the latter has an important and decisive bearing upon it. The 28th section of the statute concerning distresses, rents, and the renewal of leases (1 N. R. L. 443), after reciting that the possession of estates is rendered precarious by the frequent and fraudulent practice of tenants attorning to strangers, by which means landlords and lessors are turned out of possession, and put to the difficulty and expense of recovering possession by suits at law, enacts that every such attornment shall be null and void, and the possession of the landlords or lessors shall not be deemed to be, in any wise, changed by any such attornment;

with a proviso that nothing therein contained should extend to vacate or affect any attornment made pursuant to and in consequence of any judgment at law, or decree or order of a court of equity, or made with the privity and consent of the landlord or lessor, or to any mortgagee after the mortgage is become forfeited. a

The mischief which the statute was intended to remedy was the attornment by tenants to strangers, claiming title; and, without the proviso, the construction of the enacting part of the statute would have admitted of no doubt. But, to remove every doubt, the legislature have declared who were not strangers, and to whom the tenant might lawfully attorn; he may attorn to a mortgagee after the mortgage is forfeited. The reason of this is obvious. The mortgagee, as between him and the mortgagor, has the right of entry, and is entitled to the possession of the premises. If, then, the tenant will do voluntarily what the law will coerce him to do, yield up the possession to the mortgagee, it is not an act injurious to the just rights of the mortgagor, nor disloyal towards him. Indeed, the rights of the tenant also require that he should be allowed to do so; for, if he refuses to attorn, he at once subjects himself to eviction and the payment of costs. The statute makes no difference between a tenant to the mortgagor, who becomes so before or after the execution of the mortgage. It applies to every tenant of the mortgagor, without reference to the time when he became tenant. The reason is the same in both cases, and they are both embraced by the proviso of the statutes; and neither of them are within the mischiefs intended by the enacting part of the statute.

Judgment reversed, and a *venire de novo* to be awarded in the court below.¹

NEW YORK REAL PROPERTY LAW, § 224. *Attornment by tenant.* The attornment of a tenant to a stranger is absolutely void, and does not in any way affect the possession of the landlord unless made either: b

1. With the consent of the landlord; or,

¹ *Magill v. Hinsdale*, 6 Conn. 464 (1827), accord. Compare *McKircher v. Hawley*, 16 Johns. (N. Y.) 289 (1819), and see *Hogsett v. Ellis*, 17 Mich. 351 (1868), *contra*.

See also, *Price v. Smith*, 1 Green Ch. 516 (1838), and *Sanderson v. Price*, 1 Zab. 637 (1846), recognizing

the efficacy of attornment of tenant to mortgagee, in New Jersey, under the statute (Gen. Stat. [1896] 1920, § 26). The early case of *Souders v. VanSickle*, 3 Halst. 313 [386] (1826) "was reversed by the Court of Errors, November term, 1832."—Halst. N. J. Dig., *Tenant*, 10.

2. Pursuant to or in consequence of a judgment, order, or decree of a court of competent jurisdiction; or,

3. To a mortgagee, after the mortgage has become forfeited.¹

MAINE REV. STAT. (1883), chap. 90, § 2. A mortgagee, or person claiming under him, may enter on the premises, or recover possession thereof, before or after breach of condition, when there is no agreement to the contrary; but in such case, if the mortgage is afterwards redeemed, the amount of the clear rents and profits from the time of taking possession shall be accounted for and deducted from the sum due on the mortgage. *1916, Ch 95, Sec 2*

MASS. PUB. STAT. (1882), chap. 181, § 10. Nothing contained in this chapter shall prevent a mortgagee or any person claiming under him from entering on the premises or from recovering possession thereof before breach of the condition of the mortgage, when there is no agreement to the contrary.

¹ To the same effect are New Jersey Gen. Stat. (1896), p. 1920, § 26, and Missouri Rev. Stat. (1889), § 6373.

"It is claimed that the attornment to defendant is valid under section 2013 of the Code, which is as follows: 'The attornment of a tenant to a stranger is void, unless made with the consent of the landlord, or pursuant to or in consequence of a judgment at law or in equity, or to a mortgagee after the mortgage has been forfeited.' It is claimed that the mortgage to Hamilton was forfeited by the non-payment, at maturity, of the note secured, and that thereupon the tenant in possession had the right to attorn and transfer the constructive possession to defendant. This cannot be the meaning of this section. Under such a construction all the decisions of this court holding that the legal title and right to possession are in the mortgagor until after foreclosure and expiration of the year for redemp-

tion, could be evaded and nullified in all cases where the mortgaged property is in possession of a tenant. The decisions relied upon by appellant were based upon the common law idea of a mortgage, under which, in default of payment at the time named, the mortgagee was entitled to possession of the mortgaged premises, and might maintain an action of ejectment therefor. We are satisfied that under this section there can be no valid attornment until after foreclosure and expiration of the period of redemption, where the property is sold subject to redemption."—*PER DAY, J.*, in *Mills v. Hamilton*, 49 Ia. 108 (1878). See also *Mills v. Heaton*, 52 Ia. 215 (1879), and Code (1897), § 2990, in which the ambiguity is removed. The similar provision of the Wisconsin statute (R. S. [1871] 1165, § 1), apparently interpreted in accordance with *Jones v. Clark*, *supra*, has also been repealed. Ann. Stat. (1889), § 2182.

VERMONT STAT., § 1498. Every mortgagor shall, until condition broken, have, as against the mortgagee, the legal right of possession to the mortgaged premises, unless it is otherwise stipulated in the mortgage deed.

See. and Lams 725, 1917, § 2129

N. Y. CODE CIV. PROC. *Action to recover real property*, § 1498. A mortgage, or his assignee or other representative, cannot maintain such an action, to recover the mortgaged premises.¹

Co. filed Lams 725, 1917, § 2121: no action of ejectment shall lie against the mortgagor, or his assignee or representative, for the recovery of the premises.

STONE v. PATTERSON

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1837

(19 Pick. 476)

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ASSUMPSIT for rent from April 1st, 1835, to January 1st, 1836. On a case stated it appeared, that one Knight, being the owner of the premises, subject to a mortgage to one French, executed a lease of the same to the defendant, on the 1st of April, 1835, for three years, at a certain rent per annum, payable quarterly; that the defendant paid Knight a part of the rent in advance; that in May, 1835, Knight conveyed the premises to the plaintiffs in fee, subject to the mortgage and lease, without notice of such payment of the rent in advance, and that the plaintiffs notified the defendant that he must pay the rent to them as it should become due; that on the 20th of July, 1835, the mortgagee took possession of the premises for condition broken, but without notice to the plaintiffs, and ordered the defendant to pay the rent to him, and the defendant thereupon agreed to pay it to him from that time; and that the sum paid in advance exceeded the rent accruing between the date of the lease and the time of the entry by the mortgagee.

PER CURIAM. The payment of rent in advance was a valid payment and a good discharge *pro tanto* from the claim of the lessor to whom payment was made, and is a good bar to the claim of the plaintiffs, his assignees. The case of *Farley v. Thompson*, 15 Mass. R. 18, is decisive on this part of the case. It has been argued that the assignees ought to have been notified; and no doubt this would have been necessary if the rule of law in respect to negotiable

¹ See *Barson v. Mulligan*, 191 N. Y. 306, 84 N. E. 75 (1908).

|| securities applied to the assignments of leases; but these assignments are governed by the well-known rule of *caveat emptor*.³

| In respect to the other portion of the rent claimed, it is quite clear that the defendant was bound to pay it to French, who entered under a mortgage made previously to the lease, and ordered the rent to be paid to him. It is objected that this entry was not a good entry for condition broken, because no notice was given to the plaintiffs. But it is immaterial whether it was a good entry for the purpose of foreclosure or not; for the entry was lawful, and the mortgagee thereby became possessed of the premises, and might have expelled the defendant if he had not agreed to pay rent to him. This was equivalent to an actual and complete ouster or eviction, as was decided in *Fitchburg Manuf. Corp. v. Melven*, 15 Mass. R. 268, and in *Smith v. Shepard*, 15 Pick. 147. Such an ouster or eviction by a person having a paramount title is a good defence to an action for rent by the lessor or those claiming under him.

*Plaintiffs nonsuit.*⁴

22 208
KIMBALL v. LOCKWOOD

SUPREME COURT OF RHODE ISLAND, 1859

(6 R. I. 138)

DEBT for rent of a shop in High Street, Providence, wherein the plaintiff claimed \$150, for the last three quarters of the year elapsing between March 1, 1858, and March 1, 1859, under a lease parol by him made to the defendants.

The case was submitted to the court, under the general issue, in fact and law; and it appeared that the late Henry Matthewson, being the owner of the leased premises, in his lifetime mortgaged

³ See *Farley v. Thompson*, 15 Mass. 18 (1818), accord. *De Nicholls v. Saunders*, 5 C. P. 589 (1870), *Cook v. Guerra*, 7 C. P. 132 (1872), and (*semble*) *Castleman v. Bell*, 2 B. Mon. (Ky.) 157 (1841), contra.

⁴ *Rockwell v. Bradley*, 2 Conn. 1 (1816); *Wakeman v. Banks*, 2 *id.* 446 (1818); *Blaney v. Bearse*, 2 Greenl. (Me.) 132 (1822); *Den v. Stockton*, 7 Halst. (N. J.) 322 (1831); *Carroll v. Ballance*, 26 Ill. 9 (1861);

Gray v. Gillespie, 59 N. H. 469 (1879); *Comer v. Sheehan*, 74 Ala. 452 (1883), accord. So, after condition broken: Vermont Stat., § 1498; *Pierce v. Brown*, 24 Vt. 165 (1852); *Gartside v. Oulley*, 58 Ill. 210 (1871) (*semble*); or for the purpose of enforcing payment: *New Haven Savings Bank v. McPartland*, 40 Conn. 90 (1873); or after foreclosure: *Downard v. Graff*, 40 Ia. 597 (1875).

them in fee to his son, Henry C. Matthewson, and upon his death they, with other real estate, came into the possession of the plaintiff, whose wife was one of said Matthewson's heirs at law; that, being thus in possession, the plaintiff leased the shop in question to the defendants by parol, from March 1, 1858, to March 1, 1859, at the rent of \$200 for the year, payable quarterly; that after the death of his father, the son's mortgage having become due, on the 13th day of May, 1858, he sued the plaintiff in ejectment to recover possession of the estate of which the shop in question was a tenement, and gave notice to the defendants to pay their rent to him as mortgagee; that the defendants, having offered under the advice of counsel to pay rent to the plaintiff if he would give them a bond of indemnity against the claim of the mortgagee, which he did not do, promised the mortgagee to pay the rent to him, and did pay to him the last three quarters rent, accruing from the first day of June, 1858, to the first day of March, 1859, under a bond of indemnity from the mortgagee against the claim of the plaintiff, to recover which rent, after such payment, this action was brought. The rent of the quarter during which notice was given by the mortgagee to the defendants to pay the rent to him, was paid by them to the plaintiff.

AMES, C. J. It seems to be clear, upon principle, and is well settled by authority, that a mortgage by the lessor of lands under lease, operating as an assignment *pro tanto* of the reversion, carries the rent as incident to it to the mortgagee. In such case, therefore, all that the law requires of the mortgagee to entitle him to rent of the tenant of the mortgagor, is notice to the tenant to pay the rent to him; such notice preventing any injustice to the tenant from double payment.

If, on the other hand, the lease be subsequent to the mortgage, as the mortgage gives to the mortgagee no title to the reversion out of which the lease was granted, he cannot by mere notice compel the tenant to pay rent to him, nor does his title to the rent accrue until he has obtained possession of the mortgaged estate. He is not the landlord of the mortgagor, nor by virtue of the relation between them entitled to the rents and profits of the mortgaged estate as long as the mortgagor retains possession (*Evans v. Elliot*, 9 Ad. & Ell. 159; *The Manchester Hospital and Life Ins. Co. v. Wilson*, 10 Met. 126).

The mortgage, however, conveys the title to possession to the mortgagee, and, indeed, when, as in this case, forfeited, the whole

title at law; and, unless some statute forbid, which none here does, the tenant of the mortgagor may attorn to the mortgagee, and by thus placing him in possession of the mortgaged premises entitle him to the rents thereof. There is no disloyalty to his landlord in such attornment by the tenant, since thereby he only recognizes a title which his landlord has granted (*Jones v. Clark*, 20 Johns. 51). In *Evans v. Elliott*, *supra*, Lord Denman seems to agree that the tenant's attornment will create a privity between himself and the mortgagee, or, as he expresses it, "is at least necessary" to create the relation of tenant and landlord between them; although he decides that the attornment will not relate back to a notice before given by the mortgagee to the tenant, but creates the privity and right to rent only from the time when it is actually made. As attornment is nothing more than the consent of the tenant to the grant of the seignory, or, in other words, to become tenant of the new lord (Co. Lit. 309 a; Butler's note, 272), and the tenants in this case, by promising to pay and actually paying the rent to the mortgagee, thus attorned to, and became tenants to him, it follows that they rightfully paid to him the subsequently accruing rent, and cannot be compelled to pay it over again to the plaintiff. Judgment must therefore be rendered for the defendants, for their costs.¹

See 305 *TEAL v. WALKER*, 111 U. S. 242 (1884). MR. JUSTICE WOODS (247). The decision of the question raised by the demurrer to the complaint is not affected by the stipulation contained in the defeasance of August 19th, 1874, that Goldsmith and Teal should, on default made in the payment of the principal of Goldsmith's note, and on the demand of Hewett, surrender the mortgaged premises to him. If this was a valid and binding undertaking, it did not change the rights of the parties. Without any such stipulation, Hewett, unless it was otherwise provided by statute, was entitled, at least on default in the payment of the note of Goldsmith, to the possession of the mortgaged premises (*Keech v. Hall*, 1 Doug. 21; *Rockwell v. Bradley*, 2 Conn. 1; *Smith v. Johns*, 3 Gray, 517; *Jackson v. Dubois*, 4 Johns. 216; *Furbush v. Goodwin*, 29 N. H.

¹ *Stedman v. Gassett*, 18 Vt. 346 (1846), accord. That neither entry by the mortgagee nor attornment of the tenant is necessary to entitle the mortgagee to "intercept" the rents, see *Marx v. Marx*, 51 Ala. 222

(1874); *Comer v. Sheehan*, 74 Ala. 452 (1883). But compare *Drakford v. Turk*, 75 Ala. 339 (1883), and see *Bartlett v. Hitchcock*, 10 Bradw. (Ill.) 87 (1881), contra.

321; *Howard v. Houghton*, 64 Me. 445; *Den ex dem. Hart v. Stockton*, 7 Halst. 322; *Ely v. M'Guire*, 2 Ohio, 223; vols. 1 and 2, 2d Ed. 372). The rights of the parties are, therefore, the same as if the defeasance contained no contract for the delivery of the possession. }

We believe that the rule is without exception that the mortgagee is not entitled to demand of the owner of the equity of redemption the rents and profits of the mortgaged premises until he takes actual possession. In the case of *Moss v. Gallimore*, 1 Doug. 279, Lord Mansfield held that a mortgagee, after giving notice of his mortgage to a tenant in possession holding under a lease older than the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to that which accrues afterwards. This ruling has been justified on the ground that the mortgagor, having conveyed his estate to the mortgagee, the tenants of the former became the tenants of the latter, which enabled him, by giving notice to them of his mortgage, to place himself to every intent in the same situation towards them as the mortgagor previously occupied (*Rawson v. Eicke*, 7 Ad. & El. 451; *Burrowes v. Gradin*, 1 Dowl. & Lowndes, 213). Where, however, the lease is subsequent to the mortgage, the rule is well settled in this country, that, as no reversion vests in the mortgagee, and no privity of estate or contract is created between him and the lessee, he cannot proceed, either by distress or action, for the recovery of the rent (*Mayo v. Shattuck*, 14 Pick. 533; *Watts v. Coffin*, 11 Johns. 495; *McKircher v. Hawley*, 16 id. 289; *Sanderson v. Price*, 1 Zab. 637; *Price v. Smith*, 1 Green's Ch. [N. J.] 516).

The case of *Moss v. Gallimore* has never been held to apply to a mortgagor or the vendee of his equity of redemption. Lord Mansfield himself, in the case of *Chinnery v. Blackman*, 3 Doug. 391, held that until the mortgagee takes possession the mortgagor is owner to all the world, and is entitled to all the profits made. The rule on this subject is thus stated in Bacon's Abridgment, title Mortgage, C: "Although the mortgagee may assume possession by ejectment at his pleasure, and, according to the case of *Moss v. Gallimore*, Doug. 279, may give notice to the tenants to pay him the rent due at the time of the notice, yet, if he suffers the mortgagee to remain in possession or in receipt of the rents, it is a privilege belonging to his estate that he cannot be called upon to account for the rents and profits to the mortgagee, even although the security be insufficient." So, in *Higgins v. York Buildings Company*, 2 Atk. 107, it was said by Lord Hardwicke: "In case of

a mortgagee, where a mortgagor is left in possession, upon a bill brought by the mortgagee for an account in this court, he never can have a decree for an account of rents and profits from the mortgagor for any of the years back during the possession of the mortgagor," and the same judge said in the case of *Mead v. Lord Orrery*, 3 Atk. 244: "As to the mortgagor, I do not know of any instance where he keeps in possession that he is liable to account for the rents and profits to the mortgagee, for the mortgagee ought to take the legal remedies to get into possession." In *Wilson, ex parte*, 2 Ves. & B. 252, Lord Eldon said: "Admitting the decision in *Moss v. Gallimore* to be sound law, I have been often surprised by the statement that a mortgagor was receiving the rents for the mortgagee. . . . In the instance of a bill filed to put a term out of the way, which may be represented as in the nature of an equitable ejectment, the court will, in some cases, give an account of the past rents. There is not an instance that a mortgagee has *per directum* called upon the mortgagor to account for the rents. The consequence is that the mortgagor does not receive the rents for the mortgagee." See, also, *Coleman v. Duke of St. Albans*, 3 Ves. Jr. 25; *Gresley v. Adderly*, 1 Swanst. 573.

The American cases sustain the rule that, so long as the mortgagor is allowed to remain in possession, he is entitled to receive and apply to his own use the income and profits of the mortgaged estate; and, although the mortgagee may have the right to take possession upon condition broken, if he does not exercise the right, he cannot claim the rents; if he wishes to receive the rents, he must take means to obtain the possession (*Wilder v. Houghton*, 1 Pick. 87; *Boston Bank v. Reed*, 8 Pick. 459; *Noyes v. Rich*, 52 Me. 115). In *Hughes v. Edwards*, 9 Wheat. 500, it was held that a mortgagor was not accountable to the mortgagee for the rents and profits received by him during his possession, even after default, and even though the land, when sold, should be insufficient to pay the debt, and that the purchaser of the equity of redemption was not accountable for any part of the debt beyond the amount for which the land was sold. In the case of *Gilman v. Illinois & Mississippi Telegraph Company*, 91 U. S. 603, it was declared by this court that where a railroad company executed a mortgage to trustees on its property and franchises, "together with the tolls, rents, and profits to be had, gained, or levied thereupon," to secure the payment of bonds issued by it, the trustees, in behalf of the creditors, were not entitled to the tolls and profits of the road, even after condition broken and the filing of a bill to foreclose the mortgage, they not

having taken possession or had a receiver appointed. The court said, in delivering judgment in this case: "A mortgagor of real estate is not liable for rent while in possession. He contracts to pay interest, not rent." So in *Kountze v. Omaha Hotel Company*, 107 U. S. 378, it was said by the court, speaking of the rights of a mortgagee: "But in the case of a mortgage, the land is in the nature of a pledge; it is only the land itself, the specific thing, which is pledged. The rents and profits are not pledged; they belong to the tenant in possession, whether the mortgagor or a third person claiming under him. . . . The plaintiff in this case was not entitled to possession, nor to the rents and profits." See also *Hutchins v. King*, 1 Wall. 53, 57-58.

Chancellor Kent states the modern doctrine in the following language: "The mortgagor has a right to lease, sell and in every respect to deal with the mortgaged premises as owner so long as he is permitted to remain in possession, and so long as it is understood and held that every person taking under him, takes subject to all the rights of the mortgagee, unimpaired and unaffected. Nor is he liable for rents, and the mortgagee must recover the possession by regular entry by suit before he can treat the mortgagor, or the person holding under him, as a trespasser" (4 Kent Com. 157). See also *American Bridge Company v. Heidelberg*, 94 U. S. 798; *Clarke v. Curtis*, 1 Grattan, 289; *Bank of Ogdensburg v. Arnold*, 5 Paige Ch. 38; *Hunter v. Hays*, 7 Biss. 362; *Souter v. La Crosse Railway*, Woolworth C. C. 80, 85; *Foster v. Rhodes*, 10 Bank Reg. 523. The authorities cited show that, as the defendant in error took no effectual steps to gain possession of the mortgaged premises, he is not entitled to the rents and profits while they were occupied by the owner of the equity of redemption.

The case against the right of the defendant in error to recover in this case the rents and profits received by the owner of the equity of redemption is strengthened by section 323, chapter 4, title 1, General Laws of Oregon, 1843-1872, which declares that "a mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law." This provision of the statute cuts up by the roots the doctrine of *Moss v. Gallimore*, *ubi supra*, and gives effect to the view of the American courts of equity that a mortgage is a mere security for a debt, and establishes absolutely the rule that the mortgagee is not entitled to the rents and profits until he gets possession under a decree of foreclosure. For if a mortgage is not a conveyance, and the mort-

gagagee is not entitled to possession, his claim to the rents is without support. This is recognized by the Supreme Court of Oregon as the effect of a mortgage in that State. In *Besser v. Hawthorn*, 3 Oregon, 129, at 133, it was declared: "Our system has so changed this class of contracts that the mortgagor retains the right of possession and the legal title." See, also, *Anderson v. Baxter*, 4 Oregon, 105; *Roberts v. Sutherlin*, *id.* 219.

The case of the defendant in error cannot be aided by the stipulation in the defeasance of August 19th, 1874, exacted by the mortgagagee, that Goldsmith and Teal would, upon default in the payment of the note secured by the mortgage, deliver to Hewett, the trustee, the possession of the mortgaged premises. That contract was contrary to the public policy of the State of Oregon, as expressed in the statute just cited, and was not binding on the mortgagor or his vendee, and, although not expressly prohibited by law, yet, like all contracts opposed to the public policy of the State, it cannot be enforced (*Railroad Company v. Lockwood*, 17 Wall. 357; *Bank of Kentucky v. Adams Express Company*, 93 U. S. 174; *Marshall v. Baltimore & Ohio Railroad Company*, 16 How. 314; *Mequire v. Corwine*, 101 U. S. 108).¹

HUBBELL v. MOULSON

COURT OF APPEALS OF NEW YORK, 1873

(53 N. Y. 225)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department in favor of defendants, entered upon an order denying motion for a new trial and directing a judgment on verdict.

This action was ejectment to recover possession of the undivided

1 "Since the right of a mortgagee before default is only that of a holder of a security, he has no right to enter or bring ejectment before the default. The necessary logical result is that his right to possession is not, as at common law, the right of an owner subject only to be defeated by the performance of the condition by the mortgagor, but is only a right of re-entry upon failure of the mortgagor to perform the condition. Before that time, the mortgagor is entitled to the rents,

issues and profits, and the mortgagee cannot bring ejectment and is under the obligation to account as a mortgagee in possession. *Sanderson v. Price*, 21 N. J. Law, 646, note; *Shields v. Lowear*, 34 N. J. Law, 496, 501. Before the mortgagee can obtain possession he must enter upon the land. It is elementary that an entry requires publicity. 2 Bl. Com. 311, 312; 3 Bl. Com. 174." *Per SWAYNE, J.*, in *Cohn v. Plass*, 85 N. J. Eq. 153, 160.

half of a lot of land situate in Brighton, Monroe County. The facts appear sufficiently in the opinion. The court directed a verdict in favor of defendants, which was rendered accordingly.

ANDREWS, J. The plaintiffs claim title under Alfred Hubbell, the mortgagor, to the undivided half of premises mortgaged by him to Hiram Sibley, December 1, 1846, to secure the payment of \$7,000. The action is ejectment, and it was necessary for the plaintiffs, in order to recover under their complaint, to show that they were entitled, as against the defendants, to the possession of the premises at the time of the commencement of the action. The defendants are the grantees of Sibley, the mortgagee, under a deed dated June 7, 1849, and are in possession, claiming under that deed. They stand, by reason of that conveyance, in privity with the mortgagee, and their right to the possession is the right of the mortgagee, and the right of the plaintiffs depends upon the same principles as if Sibley was in possession and the action had been brought against him (*Jackson v. Mueller*, 10 J. R. 479; *Jackson v. Bowen*, 7 Cow. 13; *Robinson v. Ryan*, 25 N. Y. 320). The plaintiffs on the trial offered to prove that the mortgage debt had been paid by the receipt by Sibley, before the commencement of the action, of rents and profits from the land sufficient to satisfy it. The evidence was excluded. If the mortgage was in law subsisting and unsatisfied when the action was commenced, then it cannot be maintained, as the authorities are decisive that ejectment will not lie by a mortgagor against a mortgagee in possession (*Van Duyne v. Thayre*, 14 Wend. 233; *Phyfe v. Riley*, 15 Wend. 248; *Pell v. Ulmar*, 18 N. Y. 139). Leaving out of view the alleged title under the statute foreclosure, the question arises, whether the receipt by a mortgagee in possession of rents and profits sufficient to satisfy the mortgage debt, does *ipso facto* extinguish it and discharge the lien of the mortgage. If it does not, then the evidence was properly excluded. If admitted, it would not have shown a right in the plaintiffs to the possession of the premises when the action was brought.

It is the settled doctrine in this State that a mortgagee has by virtue of his mortgage a lien only, and not an estate in the land mortgaged (*Runyan v. Mersereau*, 11 J. R. 537; *Jackson v. Craft*, 18 *id.* 110; *Jackson v. Bronson*, 19 *id.* 325; *Kortright v. Cady*, 21 N. Y. 343; *Stoddard v. Hart*, 23 *id.* 560). In harmony with this view it was held in *Kortright v. Cady* that a tender of the mortgage debt after it became due discharged the lien of the mortgage and prevented a subsequent foreclosure. And it was held in

Edwards v. The Fireman's Fire Ins. and Loan Co., 21 Wend. 467, 26 *id.* 541, that upon a tender after default by a mortgagor of the mortgage debt, ejectment would lie in his favor upon the refusal of the mortgagee to surrender the possession. But while no title in a strict sense vests in the mortgagee of land until foreclosure, yet his interest is, in some cases, treated and regarded as a title, for the purpose of protecting and enforcing the equities between parties. An instance of this is found in *Mickles v. Townsend*, 18 N. Y. 575, where it was so held for the purpose of applying the doctrine of estoppel by deed against a person claiming as assignee of a mortgage which existed at the time of his prior conveyance of the mortgaged premises with warranty, but which was assigned to him afterward. And in *Van Dyne v. Thayer*, 19 Wend. 162, the release of the equity of redemption by the mortgagor to the mortgagee was held to inure as an enlargement of the estate of the mortgagee so as to prevent the plaintiff's recovering dower at law, in disregard of the equity of the defendant to have the mortgage first satisfied out of the land (Cowen, J., 21 Wend. 485).

It is easy to see that where the English doctrine prevails, that the mortgage conveys a legal title to the mortgaged premises, the right of the mortgagor to an account of the rents and profits of the land received by the mortgagee is purely and exclusively of equitable cognizance. At law, the mortgagee is the owner of the estate, and takes the rents and profits in that character. In equity, the mortgagor is regarded as the owner until foreclosure, and his right to an account is incident to his right of redemption (2 Wash. on Real Property, 161, 205; *Seaver v. Durant*, 39 Vt. 103; *Parson v. Welles*, 17 Mass. 419). But the necessity to resort to an accounting in equity, in order to have the rents and profits applied to the satisfaction of the mortgage, is not obviated by the fact that here the mortgagor retains the legal title. The mortgagee in possession takes the rents and profits in the quasi character of trustee or bailiff of the mortgagor (2 Pow. on Mort., 946 *a*; 2 Wash. 205). They are applied in equity as an equitable set-off to the amount due on the mortgage debt (*Ruckman v. Astor*, 9 Paige, 517.) The law does not apply them as received to the payment of the mortgage. It depends upon the result of an accounting upon equitable principles, whether any part of the rents and profits received shall be so applied. The mortgagee is entitled to have them applied, in the first instance, to reimburse him for taxes and necessary repairs made upon the premises; for sums paid by him upon prior incumbrances upon the estate, in order to protect the title, and for costs

in defending it; and if he has made permanent improvements upon the land in the belief that he was the absolute owner, the increased value by reason thereof may be allowed him. So he may be charged with rents and profits he might have received, if his failure to recover them is attributable to his fraud or willful default (2 Powell on Mort. 957, note; 4 Kent, 185; 2 Wash. 218; *Cameron v. Irwin*, 5 Hill, 272; *Mickles v. Dillaye*, 17 N. Y. 80). In many cases complicated equities must be determined and adjusted before it can be ascertained what part, if any, of the rents and profits received is to be applied upon the mortgage debt. In the absence of an agreement between the parties there is no legal satisfaction of the mortgage by the receipt of rents and profits by a mortgagee in possession to an amount sufficient to satisfy it, and his character as mortgagee in possession is not divested until they are applied by the judgment of the court in satisfaction of the mortgage. These considerations lead to an affirmance of the judgment without considering the question of the validity of the statute foreclosure.

The plaintiffs claim to recover upon the allegation of a right to the possession of the premises when the action was commenced. The defendants were in possession, claiming under the mortgagee whose mortgage was outstanding and unsatisfied. The action is not for a redemption or for an accounting, and the plaintiffs are not in the attitude of resisting an attempt by the mortgagee to enforce the mortgage.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.¹

HERRMANN v. CABINET LAND CO.

COURT OF APPEALS OF NEW YORK, 1916

(217 N. Y. 526)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 19, 1914, affirming a judgment in favor of defendant entered upon an

¹ See, also, *Phyfe v. Riley*, 15 Wend. 248 (1836); *Madison Ave. Church v. Oliver St. Church*, 73 N. Y. 82 (1878); *Townshend v. Thomson*, 139 N. Y. 152 (1893); *Becker v. McCrea*, 193 N. Y. 423 (1908); *Gillett v. Eaton*, 6 Wis. 30 (1857); *Hennesy v. Farrell*, 20 Wis. 42 (1865);

Harper v. Ely, 70 Ill. 581 (1873); *Johnson v. Sandhoff*, 30 Minn. 197 (1883). But where the mortgagee claims under an equitable mortgage, see *Jackson v. Parkhurst*, 4 Wend. 369 (1830) and *Chase v. Peck*, 21 N. Y. 581, 586 (1860), *supra*, p. 99.

order of Special Term granting a motion by defendant for judgment in its favor upon the pleadings.

This is an action of ejectment. Both parties claim under one William Bragaw, who owned the lands in question in the year 1870. The plaintiffs claim as grantees under Bragaw by virtue of several meane conveyances. One Charles H. Schorr was the owner in the plaintiffs' chain of title in the year 1874.

The defendants claim under a purchase-money mortgage which Bragaw took from his immediate grantee. In 1894 the executors of Bragaw began an action to foreclose the mortgage. Charles H. Schorr, aforesaid, was named as a party to the action, and an affidavit showing service on him of the summons and complaint appears in the foreclosure proceedings. The fact is that Schorr died about the year 1890, and the affidavit of service on him is, of course, erroneous. The land was sold under the judgment in the foreclosure action and the defendant takes title under the purchaser at the foreclosure sale.

The plaintiffs are heirs of Schorr and they bring this action to recover possession of the mortgaged property. The defendant in the second defense in the answer sets up the mortgage to Bragaw and the foreclosure thereof and the sale thereunder. The answer also contains an allegation as part of the second defense that the defendant entered peacefully into the possession of the land in reliance upon the fact that the foreclosure proceedings showed service of the summons and complaint on Schorr, and a further allegation that the plaintiffs have not offered to pay the amount due on the mortgage or any part thereof. The defendant claims to hold the property sought to be recovered as mortgagee in possession.

To this second defense the plaintiffs demurred on the ground that it was insufficient in law upon the face thereof. The defendant was successful at the Special Term and the judgment in its favor was affirmed by the Appellate Division.

CUDDEBACK, J. In order to acquire the rights of a mortgagee in possession it was necessary for the defendant to show that it had entered with the mortgagor's consent, or had otherwise entered lawfully. It was not sufficient to show an entry under circumstances that would constitute a trespass. (*Barson v. Mulligan*, 191 N. Y. 306, 321.)¹ These propositions are not disputed by the de-

¹ In this case, the Court of Appeals said (1908): "The mortgagee has no means of getting possession that a stranger has not."

defendant's counsel, but he claims that the defendant's possession is in accord therewith, and he relies upon the defective foreclosure proceedings to sustain his position. He attributes in some way or other to those proceedings the force of a consent on the part of the defendants in that action, even if they were not served and did not appear, to the possession of the defendant in this action which makes its entry lawful.

But a judgment of foreclosure in which the owners of the equity of redemption have not been served with process or do not voluntarily appear, is absolutely without jurisdiction and as against such owners the purchaser at the sale under the judgment derives no title whatsoever. (*Watson v. Spence*, 20 Wend. 260; *Shriver v. Shriver*, 86 N. Y. 575; *Wing v. Field*, 35 Hun, 617; *Thomas on Mortgages* [3d ed.], § 256.)

Schorr, the owner of the equity of redemption, was dead when the foreclosure proceedings were instituted, and his heirs at law, the plaintiffs, so far as it appears, never heard of the suit or the sale and conveyance of the mortgaged property, and their present attitude is wholly opposed to the idea that they ever expressly or impliedly consented to the defendant's possession.

It seems to me that the case of *Howell v. Leavitt* (95 N. Y. 617), controls the decision here. In that case the owners of the equity of redemption were not made parties to a suit in foreclosure and the judgment against them was enforced by a writ of assistance which put the mortgagee in possession. The court held that the possession of the mortgagee was without lawful authority and amounted to a trespass. *Deutsch v. Hoab* (135 App. Div. 756) is to the same effect.

The plaintiffs seek to distinguish the case of *Howell v. Leavitt* (*supra*) from the case under consideration by the fact that in the former the owners of the equity of redemption were excluded from possession and the mortgagee was installed by means of a writ of assistance, but that is not a substantial difference. The judgment of foreclosure and the sale thereunder is binding upon the defendants in the action and they are bound to comply therewith whether or not a writ of assistance is issued. It cannot be said that by yielding up possession of the premises sold under the judgment, without awaiting the issuance of the writ, the defendants waive any of their rights.

It may be that if some lienor claiming subsequent to the mortgage were here complaining of the defective foreclosure, or alleging that he had not been served with process, the court would re-

quire him to redeem and would regard the purchaser in possession under the foreclosure sale as a mortgagee in possession. But in a case like this where the owners of the equity of redemption have not been served and they are complaining, it would be unjust to say that their only remedy against the purchaser is an action for an accounting and for permission to redeem the premises from the mortgage. If that were the law, the mortgagee in most cases would only have to await a time when the mortgaged premises were temporarily unoccupied and enter peacefully thereon, and the mortgagor would then be limited to an action to redeem with all the burden of attack and of proof resting upon him.

No case cited by the defendant from the courts of this state goes to the extent of so holding.¹

In the case of *Howell v. Leavitt* (*supra*) it is said of these decisions and others of a like character: "In most of the cases which have upheld the right of the mortgagee, his possession was obtained with the consent, express or implied, of the owner of the land, although in some of them the mode of acquiring possession did not distinctly appear, and in many the rule is stated quite broadly and with little of restriction or limitation" (p. 621). The cases cited by the defendant fall short of sustaining its claim.

Within the principle of *Howell v. Leavitt* (*supra*) the entry of the defendant upon the mortgaged premises was a trespass and nothing more, and the defendant did not thereby acquire the rights of a mortgagee in possession. The second defense is, therefore, insufficient.

I recommend that the judgment appealed from be reversed, with costs in all courts, and defendant's motion for judgment on the pleadings be denied.

WILLARD BARTLETT, Ch. J., CHASE, COLLIN, CARDOZO, SEABURY and POUND, JJ., concur.

*Judgment reversed, etc.*²

¹ The discussion by the court of the following cases is omitted: *Pell v. Ulmar*, 18 N. Y. 139, 142; *Winslow v. Clarke*, 47 N. Y. 261; *Miser v. Beekman*, 50 N. Y. 337; *Hubbell v. Sibley*, 50 N. Y. 468; *Townshend v. Thomson*, 139 N. Y. 152.

² *Accord, Newton v. McKay*, 30 Mich. 390 (1874). But see *Walters v. Chance*, 73 Kans. 680 (1906). Such early New York cases as *Phyfe v. Riley*, 15 Wend. 248 (1836) must now be regarded as overruled.

CHAPTER I. (*Continued*)

SECTION III.—DOWER AND CURTESY

NASH *v.* PRESTON

COURT OF KING'S BENCH, 1631

(3 *Cro. Car.* 190)

A BILL in chancery was referred to Jones, Justice, and myself [Croke, J.] to consider whether one should be relieved against dower demanded, &c.

The case appeared to be that J. S., being seised in fee, by indenture inrolled, bargains and sells to the husband for one hundred and twenty pounds, in consideration that he shall re-demise it to him and his wife for their lives, rendering a peppercorn; and with a condition that if he paid the hundred and twenty pounds at the end of twenty years the bargain and sale shall be void. He re-demised it accordingly, and dies; his wife brings dower.

The question was, whether the plaintiff shall be relieved against this title of dower?

We conceived it to be against equity and the agreement of the husband at the time of the purchase, that she should have it against the lessees; for it was intended that they should have it re-demised immediately to them as soon as they parted with it; and it is but in nature of a mortgage; and upon a mortgage, if land be redeemed, the wife of the mortgagee shall not have dower. And if a husband take a fine *sur cognisance de droit come ceo*, and render arrear, although it was once the husband's, yet his wife shall not have dower, for it is in him and out of him *quasi uno flatu*, and by one and the same act. Yet in this case we conceived that by the law she is to have dower; for by the bargain and sale the land is vested in the husband, and thereby his wife entitled to have dower; and when he re-demises it upon the former agreement, yet the lessees are to receive it subject to this title of dower; and it was his folly that he did not conjoin another with the bargainee, as is the ancient course in mortgages. And when she is dowable by act or rule in law, a court of equity shall not bar her to claim her dower, for it is

against the rule of law, viz., "Where no fraud or covin is, a court of equity will not relieve." And upon conference with the other justices at Serjeants-Inn upon this question, who were of the same judgment, we certified our opinion to the court of chancery that the wife of the bargainee was to have dower, and that a court of equity ought not to preclude her thereof.

NOEL *v.* JEVON, 2 Freem. Ch. 43 (1678). *In Curia Cancellariae*. The bill was to be relieved against the defendant's dower, her husband being only a trustee; and it appearing that the husband was but a trustee, the defendant was barred of her dower, contrary to the opinion of *Nash v. Preston*, 1 Cro. Car. 191, and so it was said is the constant practice of the court now.¹

CASHBORN *v.* INGLISH

COURT OF CHANCERY, 1738

(7 Vin. Abr. 156)

THE resolution of the court by LORD CHANCELLOR [HARDWICKE]. The principal question in this case, on which I am now to give my opinion, is whether the defendant English can be tenant by the curtesy of an equity of redemption. The mortgagee came into possession in 1731.

Thomas Cashborn, father of the plaintiff and of the wife of the defendant English, by virtue of a marriage settlement being seized of some lands in tail and of other lands in fee simple, had issue three daughters. Part of the land of which he was seized in fee he settled on himself for life, with remainder to Anne, his eldest daughter in fee, and the other part of such lands he devised by his will to the said Anne, his daughter, and her heirs, subject to the payment unto her two sisters of £200 apiece. Anne, after the death of her father, borrowed £900 of the defendant Scarf, and by lease and release of 24th and 25th of June, 1728, mortgages part of the fee simple lands to the said Scarf and his heirs, under

¹ "If the husband was seized merely as trustee, the wife would be entitled to dower at common law; but this court would not suffer her to take advantage of it."—*Hinton v.*

Hinton, 2 Ves. Sen. 634. "Because the estate, in equity, would not belong to the trustee but to the *cestui que trust*."—*Finch v. Earl of Winchelsea*, 1 P. Wms. 278.—Rep.

a proviso to be void on payment of £900 and interest. August 6th, 1729, the said Anne intermarried with the defendant English, and in 1731 died, leaving issue by him a son, who died without issue, and on his death his two aunts, the plaintiffs, became his heirs at law and entitled to that inheritance, and, as such, brought their bill, Trin., 1733, in this court, against mortgagee defendant Scarf and the defendant English, among other things for a redemption of the mortgaged premises, and to have an account of the rents and profits of the real estate which belonged to the plaintiff's wife, that descended to his son, from the time of the death of such son, as heir at law to both of them.

The defendant English insisted to be entitled to the mortgaged premises for his life, as tenant by the curtesy, and the cause, being at issue, was heard on the 8th of May, 1735, before his Honour, the Master of the Rolls, when it was decreed that the defendant English was not entitled to be tenant by the curtesy of the mortgaged estates, and so was decreed to account for the rents and profits thereof from the death of his son.

From this decree the defendant English thought fit to appeal, and the general question now is whether the husband can be tenant by the curtesy of the equity of redemption upon a mortgage in fee? This question depends on two considerations:

First. What kind of interest an equity of redemption is considered to be in the eye of this court?

Second. What is requisite to entitle the husband to be tenant by the curtesy?

First. What kind of interest in the eye of this court an equity of redemption is? An equity of redemption has always been considered in this court as an estate in the lands; it is such an interest in the land as will descend from ancestor to heir, and may be granted, entailed, devised or mortgaged, and that equitable interest may be barred by a common recovery; which proves that an equity of redemption is not considered barely as a mere right, but such an estate whereof, in the consideration of this court, there may be a seisin, or a devise of it could not be good. The person who is entitled to the equity of redemption is in this court considered as owner of the land, and the mortgagee to retain the land as a pledge or deposit. And for this reason it is that a mortgage in fee is considered as a personal estate, notwithstanding the legal estate vests in the heir in point of law. The husband of a mortgagee in fee shall never be tenant by the curtesy of the mortgaged estate unless there be a foreclosure, or that such mortgage has subsisted

for so great a length of time as the court thinks sufficient to induce them not to grant a redemption. . . .

It is objected by the plaintiffs that an equity of redemption is only a right of action, and not to be considered as such an estate whereof there can be a tenancy by the curtesy, but this is by no means well founded; for this is no otherwise a right of action than every trust, and as there can be no benefit had of an equity of redemption but by suing a subpoena out of the court, so is the case of every mere trust in land, which is considered as a real estate in this court, but cannot be come at without a subpoena. To say that is a mere right of action is by consequence to say that the estate in the lands is in nobody, and this determines the question; for if a mortgage is but a chose in action, this affirms that the equity of redemption is the real ownership of the estate, and this will determine the point between them.

It is objected that the mortgagee is not barely a trustee for the mortgagor; it is true, not barely a trustee, but it is sufficient for the present purpose if he is in part a trustee for the mortgagor, and it is most certain that as to the real estate in the land the mortgagee is only a trustee for the mortgagor till foreclosure. Mortgagee is only owner as a charge or incumbrance, and intitled to hold as a pledge, and as to the inheritance descended and real estate in the land, the mortgagee is a trustee for the mortgagor till the equity of redemption is foreclosed.

Secondly. The next consideration is what is requisite to intitle the husband to be tenant by the curtesy. At law four things are necessary to make a tenancy by the curtesy, to wit, marriage, having issue that may inherit, death of the wife, and seisin of the wife (Co. Litt. 30 a). Here it is admitted that the three first did concur, but the objection that is relied on is that there was no actual seisin of the wife during the coverture, which is contended to be as necessary in respect to an equitable estate as of a legal estate, and it is admitted that the wife had no actual seisin of the legal estate, either in fact or in law. Here is no dispute whether actual seisin in consideration of law, but all that is beside the present question; for the proceedings are upon a supposition, as no such thing as a tenant by the curtesy; but the true question is upon this point, whether there was not such a seisin or possession in the wife of the equitable estate in the land, as in consideration of equity is equivalent to an actual seisin of a legal estate at common law.

In consideration of this court, I am of opinion there was such

a seisin of the wife in the present case of the equity of redemption.

I have shown that a person intitled to the equity of redemption is owner of the land of the legal estate; and, if so, there must be a seisin of the legal estate; and what other seisin could there be than what English and his wife had in the present case? For here is a mortgage in 1728 by Anne Cashborn, who in 1729 married with the defendant English, and in 1731 died, leaving issue a son, and the wife was all along in possession till her death, and mortgagee did not come into possession till after her death, and there is not any foreclosure, and though the possession of the wife was but as tenant at will to the mortgagee, yet it was, in equity, a possession of the real owner of the land, subject only to a pecuniary charge on it, and from thence I think it clearly follows that there cannot be a higher seisin of an equitable estate.

Next, whether there can be tenant by the curtesy? I am of opinion there may be a tenant by the curtesy of the equitable estate of the wife; equity follows the law because made a rule of property.

And as to the next objection of the wife's not being endowed of an equity of redemption on a mortgage in fee, and that therefore a husband ought not to be tenant by the curtesy of an equity of redemption, this proves too much; for it has been determined that a wife shall not be endowed of a trust estate, yet that husband shall be tenant by the curtesy of a trust estate. The argument from dower to the case of a tenant by the curtesy fails in this case. Perhaps it may be hard to find out a sufficient reason how it came to be so determined in the one case and not in the other, but it is safe to follow former precedents and what are settled and established, and if such precedents should be departed from, I hold it fit rather that the wife should be allowed her dower of a trust estate, and not that a tenancy by curtesy of a trust estate should be taken away. It may be refusing to allow the wife dower of a trust estate was because she could not have it at law, and that it was founded on the maxim of *equitas sequitur legem*;¹ but whatever the reason of such refusal was, the husband is allowed to have a tenancy by the curtesy of a trust estate, nay, even of money directed to be laid out in land, though not actually laid out, as in the case of *Sweetapple* before cited. . . .

For these reasons, upon the best consideration (although I form my judgment with great deference, when I differ in opinion from other great persons that have gone before me), I am of opinion that

¹ The rule was changed in Eng- by St. 3 & 4 Wm. IV, c. 105
land and dower thereafter allowed (1833).

the defendant English is intitled to be tenant by the curtesy of the mortgaged premises in question, and the consequence of that is that that part of the decree of his Honour, the Master of the Rolls, whereby it is adjudged that the said defendant is not tenant by the curtesy, must be reversed (MS. Rep. Hill. Vac. 11, Geo. 2).

TITUS v. NIELSON, 5 Johns. Ch. 452 (1821). The petition of Catherine Nielson was presented, claiming dower out of the proceeds of the sale of an equity of redemption in certain mortgaged premises. The opinion was, in part, as follows: .

THE CHANCELLOR [KENT]. The claim of the widow must be admitted, according to a series of decisions in the courts of this State. In England dower is considered as a mere legal right and equity follows the law and will not create the right where it does not subsist at law.¹ It is on this principle, according to Lord Redesdale (2 Sch. and Lef. 388), that a court of equity will not allow dower of an equity of redemption reserved upon a mortgage in fee, though there may be dower of an equity of redemption upon a mortgage for a term of years, because in that case the law gives dower subject to the term. The justice, however, of allowing dower of an equitable estate seems to have been very generally felt and acknowledged in the English courts of equity. But we have nothing to do at present with the English adjudications on the subject, for, as our courts of law do now allow dower in certain cases of an equity of redemption, this court, according to the doctrine referred to, ought to follow the law, and also allow dower out of the proceeds of the equity of redemption, and which proceeds have in this case been placed before the court. . . .

The case of *Coles v. Coles*, 15 Johns. Rep. 319, went a step still further, and held that, where a person seised of land in fee mortgages it, and afterwards marries, his widow was entitled to dower out of that equity of redemption, against the purchaser of that equity, though the mortgage was still subsisting. Here was a final and full establishment in our courts of law of the principle, not admitted in the English courts of law, that a wife could be endowed of an equity of redemption arising upon a mortgage in fee, and this court ought to follow the rule of law. It ought to do so, according to the rule and practice of the courts of equity in England in

¹The rule was changed in Eng- by St. 3 & 4 Wm. IV, c. 105
land and dower thereafter allowed (1833).

the like case; and because the doctrine recognizing the legal title of the mortgagor before foreclosure first originated in this court, and was confirmed in the Court of Appeals, and, finally, because it is a most just and reasonable doctrine, and has been so acknowledged throughout the history of the cases.¹

STOW v. TIFFT

SUPREME COURT OF JUDICATURE OF NEW YORK, 1818

(15 Johns. 458)

THIS was an action of dower, brought to recover dower in two lots in Douglas patent, in the town of Bolton, in the county of Warren. The tenant pleaded *ne unques seisie que dower*, and *ne unques accouplé in loyal matrimonie*. The cause was tried before Mr. J. Yates, at the Warren circuit, in June, 1817.

The marriage of the demandant, and the death of her husband in December, 1804, were proved. Timothy Stow, the husband of the demandant, purchased the premises in question during the coverture, and paid part of the consideration money; and to secure the payment of the residue, executed, at the time of receiving the conveyance, a mortgage of the same premises to the grantor; after his death the land was sold under a power contained in the mortgage, and was purchased by a person from whom the tenant derived his title.

A verdict was found for the demandant, subject to the opinion of the court, on a case containing the above facts.

SPENCER, J., delivered the opinion of the court.² The demandant's right to recover her dower depends on the nature of her husband's seisin. Timothy Stow, her husband, purchased the premises in question after his marriage with the plaintiff, and paid part of the consideration money; and for securing the residue, he, at the time of receiving his conveyance, executed to the grantor a mortgage of the same premises. After his death the premises were sold under a power contained in the mortgage, and the defendant holds under that sale. The question to be decided is whether there was such a seisin of the husband of the demandant as to entitle her

¹ This is the general rule in the United States; but see *Stelle v. Carroll*, 12 Peters, 201 (1838).

² Dissenting opinion of THOMPSON, Ch. J., omitted.

to dower. This depends on the single point whether the seisin of the husband was an instantaneous seisin or not. If it was an instantaneous seisin, then, according to all the authorities, the wife is not endowable. This general position is met with in all our books, that the husband's seisin for an instant does not entitle the wife to dower. This is exemplified by the case of *Amcotts v. Catherrick*, Cro. Jac. 615. There the husband, who was seised in special tail, made a deed of feoffment to the use of himself for life, and after to the use of his son in tail, and made a letter of attorney to make livery. Before livery he took the demandant to wife, and after livery was made to those uses the husband died, and the question was, whether the wife was entitled to dower; and it was adjudged that she was not, for that the livery did not gain to the husband any new estate, but being *eodem instanti* drawn out of him, he gained no seisin whereof his wife was dowable; for that having no estate before the feoffment whereof the wife was dowable, he gained none by the feoffment of which his wife could be endowed. Three cases were there put in which the wife would not be entitled to dower: as where a tenant for life or a joint tenant makes a feoffment; so where a married man took a fine and by the same fine rendered the land to another in tail, his wife shall not be endowed thereof, because, although he took it in fee, yet it is instantly out of him; so if a feoffment be made to one and his heirs, to the use of another and his heirs, the wife of the trustee shall not be endowed, for he was the mere instrument and had but an instantaneous seisin (2 Co. 77).

The case of *Nash v. Preston*, Cro. Car. 190, would seem, at first view, to be opposed to the proposition that a deed to the purchaser and a mortgage given back by him to the grantor at the same time, would not entitle the wife of the purchaser to her dower; yet it is observable that the principle is admitted that an instantaneous seisin of the husband does not entitle the wife to dower. Croke admits that if a husband take a fine *sur cognisance de droit come ceo* and render arrear, although it was once the husband's, yet his wife shall not have dower, for it is in him and out of him *quasi uno flatu* and by one and the same act. That case does not state that the redemise was made at the same time with the bargain and sale, and I presume it was not. That case, therefore, does not bear on the general principle.

I am authorized to say, by the decision of this court in *Jackson v. Dunsbagh*, 1 Johns. Cas. 95, that where two instruments are executed at the same time between the same parties relative to the

same subject-matter, they are to be taken in connection, as forming together the several parts of one agreement. I entirely agree in the opinion expressed by Ch. J. Parsons in the case of *Holbrook v. Finney*, 4 Mass. Rep. 569, that where a deed is given by the vendor of an estate, who takes back a mortgage to secure the purchase money at the same time that he executes the deed, that there the deed and the mortgage are to be considered as parts of the same contract, as taking effect at the same instant, and as constituting but one act; in the same manner as a deed of defeasance forms, with the principal deed to which it refers, but one contract, although it be by a distinct and separate instrument.

The substance of a conveyance where land is mortgaged at the same time the deed is given, is this. The bargainor sells the land to the bargainee on condition that he pays the price at the stipulated time, and if he does not that the bargainor shall be resealed of it, free of the mortgage; and whether this contract is contained in one and the same instrument, as it well may be, or in distinct instruments executed at the same instant, can make no possible difference. It is true that courts of equity have interposed to relieve the mortgagor against the accident of his nonpayment of the price, at the stipulated period. It is also true that courts of law have considered the interest of the mortgagor as liable to be sold on execution. This, however, does not interfere with the question as to how the contract between the original parties is to be viewed as between themselves when the equity of redemption is gone and forfeited.

The opinion which the court has formed receives decisive support from the declaratory act of the 28th sess., ch. 99. It recites that whereas doubts have arisen whether mortgages given to secure the purchase money of land sold and conveyed at the time of the execution of such mortgages, are to be preferred to judgments previously obtained against the mortgagors, for the removal whereof it is enacted and declared that whenever lands are sold and conveyed and a mortgage is given by the purchaser at the same time to secure the payment of the purchase money, such mortgage shall be preferred to any previous judgment which may have been obtained against such purchaser.

This statute conveys the sense of the legislature that the seisin of the mortgagor, under the circumstances stated in the act, was a seisin for an instant only; for it cannot be doubted that a judgment will attach on lands of which the judgment debtor becomes seised at any time posterior to the judgment; and nothing could

prevent a judgment creating a lien on the subsequently acquired lands of the judgment debtor but the circumstance that his seisin, in the given case, was instantaneous. Surely, then, the analogous case of dower cannot stand on a better footing than a judgment unsatisfied. As a declaratory act, this statute is entitled to high respect; and it fortifies and supports the position that the demandant's husband acquired, by the deed to him, a seisin, which he parted with *eo instanti* he acquired it, and that his wife is not endowable of the premises. The court are very well satisfied that the law is so, for it would be extremely inequitable in most cases to claim dower on such purchases. We are, therefore, of opinion that there must be judgment for the defendant.

*Judgment for the defendant.*¹

EVERSON *v.* McMULLEN

COURT OF APPEALS OF NEW YORK, 1889

(113 N. Y. 293)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made September 13, 1887, which affirmed a final judgment in favor of plaintiff, entered upon a decision of the court confirming the report of a referee, and also modified and affirmed, as modified, an interlocutory judgment.

This action was brought by plaintiff, as the widow of Morgan Everson, to recover dower in certain premises.

On the trial the court held that plaintiff's dower interest should be charged with its just proportion of a mortgage in which she joined with her husband, which is set forth in the opinion, and an interlocutory judgment was entered accordingly, referring it to a referee to admeasure the dower. The General Term, on appeal from the interlocutory judgment, modified it, adjudging that the mortgage was not to be considered in the admeasurement.

The material facts are stated in the opinion.

FINCH, J. We are required to settle on this appeal the disagreement between the trial court at the first hearing and the General Term, and determine which decision was correct.

¹ The cases generally are accord: made to a third person: *Clark v. Thomas v. Hanson*, 44 Iowa, 651 *Munroe*, 14 Mass. 351 (1817); *Jones v. Parker*, 51 Wis. 218 (1881). (1876); even where the mortgage is

The property in question was owned originally by Morgan Everson, who mortgaged it to the Rondout Savings Bank for \$12,000; his wife, who is the present plaintiff, joining with him in the mortgage to cover her inchoate right of dower. Everson died soon thereafter, and his executor sold the equity of redemption at public auction for one dollar. The case does not disclose the authority upon which he acted, but nobody disputes it, and the action was tried upon the assumption that a valid title existed in the purchaser. That purchaser was Coykendall, who assigned his bid to Preston, to whom the executor's deed was made. Preston took title before August, 1877, and thereupon gave a new mortgage to the savings bank upon the property for \$2,000 to further secure an accumulation of interest upon the original mortgage. It appears that Preston gave a bond accompanying the mortgage, and so became personally liable for a possible deficiency, and the bank gained that additional security for its unpaid interest; but while it is said generally that the mortgage was given to pay the interest, it is not shown that the mortgagee accepted the new securities as a payment pro tanto upon the original incumbrance by any indorsement or equivalent action, or held them in any other way than as collateral to the original debt. In August, 1877, Preston and his wife conveyed to Crosby by a quit-claim deed, but containing a provision by which the latter assumed and agreed to pay the \$2,000 mortgage given by Preston to the bank, as a part of the consideration for the purchase. The consideration named in the deed was \$221. Preston did not, on his purchase assume or become liable to pay any part of the original mortgage, but took title merely subject to its lien. When he gave his \$2,000 bond and mortgage it was in aid of his own title, and not in pursuance of any duty due to the representatives of the mortgagor. Probably his obligation was merely collateral to the primary lien, and so both he and his land became sureties for the unpaid interest; but if not, and the new mortgage was a payment of so much of the old debt, it was entirely voluntary, and he, and Crosby who took his place, stood in the attitude of sureties after paying the unpaid interest, entitling them to subrogation as against the land. Crosby thereafter conveyed a portion of the property to McMullen by a warranty deed, free and clear of all incumbrance. He was enabled to do this by an arrangement at the time, to which his grantee and the bank were parties. The substantial point of that arrangement was a distribution of the original mortgage, in agreed proportions between the two parcels into which, by McMullen's purchase, the land was to

be divided. To effect this separation and severance of the lien, McMullen gave the bank a mortgage on his parcel for \$5,500 as a substitute for \$4,000 of the principal of the original mortgage, and of the unpaid interest collaterally secured by the bond and mortgage of Preston, \$500 of the interest having been paid in cash by Crosby. The bank on its part formally released McMullen's parcel from the lien of its original mortgage, indorsing thereon a payment of \$4,000, and cancelled and discharged the \$2,000 mortgage of Preston, and Crosby was thus enabled to make his conveyance free from incumbrance.

On this state of facts the widow demanded dower in McMullen's parcel. The Special Term, on the first trial, held that she was bound to allow as against her dower a just proportion of the original mortgage and its interest, and sent the case to a referee to ascertain that just proportion, with a direction that the McMullen mortgage should be recognized and allowed in ascertaining the amount of such indebtedness. The General Term, on the contrary, were of opinion that the widow was not bound to contribute, and should have dower in the whole parcel without allowance or diminution; and it is that controversy which awaits our judgment. It is not doubtful on which side the equity exists. The widow subordinated her dower to the payment of the husband's debt. Whoever, in the room of a foreclosure by the mortgagee, pays that debt to him when under no personal liability for its discharge, is entitled in equity to the protection of the mortgagee's right as against the dower which it covered and charged. The purchaser from the husband acquired only the equity of redemption. While, technically, he took the fee, in truth he took it subject to the interest of the mortgagee carved out of it by the mortgage as a lien. Payment to the mortgagee in an equitable sense, is a purchase of that interest from him, and in equity the owner of the fee holds it under the mortgagee as to that interest, and under the husband only as to the equity of redemption. That is an answer to the doctrine invoked by the respondent that a release of dower is available only to one who claims under the very title which was created by the conveyance with which the release is joined (*Malloney v. Horan*, 49 N. Y. 118). That would be a good answer to the appellant's claim in a court of law, possibly, but does not govern his case in equity, since there the truth of his holding, outside of the legal form, is under the mortgage to the extent of the mortgage debt. For his payment of that debt is not a duty which he owes to the husband's estate or to any one, but a transaction in his own interest, the exact

and obvious purpose of which is to add the right of the mortgagee to the right bought of the husband. The widow is left where her own voluntary act placed her. By joining in the mortgage she postponed her dower to the equity of redemption. She has that right still, and seeks to enlarge it because of a payment made not by her husband, or in performance of a duty due to him or those representing him, but by one acting wholly in his own interest and seeking to add to that as acquired from the husband the further right held by the mortgagee. The purchaser in the present case took his land charged as surety for the husband's debt. While he, personally, was not bound to pay it, his land was held, and paying the debt of husband and wife, as represented by the mortgage, he had a right, as against them, to be subrogated to the position of the mortgagee and to stand in equity as the purchaser and holder of his security.

Thus far I have assumed that the giving of the new mortgage operated as a payment, *pro tanto*, of that held by the bank. That is a needless concession, because the finding in this case rebuts any intention of payment, and establishes that a severance of the original lien was all that was contemplated by the parties, and the giving of the new mortgage was meant, in its practical effect, to serve as a transfer of so much of the original lien to the severed parcel. Equity may look through the form of the transaction to ascertain its substance, and so looking cannot fail to see that the new mortgage is so much of the old one in a changed form, but secures the old debt as did its predecessors. The finding is justified by the facts, and upon that basis the dower remains subject to the proportionate part of the original lien.

I think these views are fully sustained by the authorities. In *Swaine v. Perrine*, 5 Johns. Ch. 491, the mortgage given by the husband and wife was outstanding at his death; the equity of redemption passed to the heir who redeemed the land by paying the mortgage, and the widow who claimed dower was required to contribute her ratable proportion of the redemption money. In *Popkin v. Bumstead*, 8 Mass. 491, the husband and wife joined in a mortgage to one Capen, and after the death of the husband his administrator, under the order of the probate court, sold the equity of redemption to Wheelock, who conveyed it to Bumstead. The latter paid off the mortgage and it was discharged of record. The widow thereupon demanded her dower, but the court held she was barred.¹ This case, which is very like the one at bar, was

¹ Cf. *Eaton v. Simonds*, 14 Pick. (Mass.) 98 (1833).

cited in *Van Dyne v. Thayer*, 19 Wend. 171, with apparent approval. Judge Cowen reviews many of the cases and holds that *Collins v. Torry*, 7 Johns. 278, and *Coates v. Cheever*, 1 Cow. 475, were decided without full consideration. Near the close of his opinion he says: "My deduction from this and other cases, I state in the words of Chancellor Kent (4 Comm. 45, 3d ed.), the wife's dower in the equity of redemption only applies in case of redemption of the incumbrance by the husband or his representatives, and not when the equity of redemption is released to the mortgagee or conveyed." I am not aware that the authority of that case has been overthrown.

The cases cited in behalf of the widow confirm rather than question the views we have expressed. In *Bartlett v. Musliner*, 28 Hun, 235, the purchaser had assumed and agreed to pay the mortgage debt as a condition of his purchase, and, having come under that obligation, might be deemed to have paid in behalf of the husband or his estate. The distinction is referred to in *Jones on Mortgages*, vol. 1, § 866, where it is said that, if the mortgage "be redeemed by the heir or purchaser, or by any one interested in the estate who is not bound to pay the debt, to avail herself of this right she must contribute her proportion of the charge according to the value of her interest." In *Runyan v. Stewart*, 12 Barb. 537, the action was at law, and, while a majority of the court sustained the claim of dower, it was explicitly said that the result would be different in equity. In that case Runyan and his wife gave a mortgage, and thereafter the husband gave a conveyance to Baker, who assumed the payment of the mortgage. The court question the case of *Popkin v. Bumstead* (*supra*), but add that, in equity, Baker might be subrogated and have a decree for contribution. No reference was made to the assumption of the mortgage by Baker. In *Jackson v. Dewitt*, 6 Cow. 316, there was a release to the mortgagee and dower was denied. In *Wedge v. Moore*, 6 Cush. 8, the whole argument is founded upon an assumption of the mortgage debt by the purchaser, which is argued out from the facts. In *Platt v. Brick*, 35 Hun, 127, the action was by the purchaser of the equity of redemption, who was not bound to pay the mortgage debt, to compel the mortgagee to assign his mortgage for the protection of the purchaser's title against dower, its amount having been tendered. The court held that the assignment could be compelled; that there was a right of subrogation; that the assignment would not work a merger, and the mortgage could be interposed against the claim of dower. Of course, the technical or formal assignment is material

only as showing a transfer rather than a payment, and where no payment was intended or made, but the mortgage debt subsisted in the new mortgage given, the result must be the same.

On the whole, I am satisfied that where the purchaser of the equity of redemption is not bound to pay the mortgage debt, but does, in fact, pay it in aid of his own title and estate, whereby it is discharged, the claim of dower is subject to a just contribution. And the case is stronger where, as here, the technical payment consists in the substitution of a new mortgage intended to operate as and take the place of so much of the old one. The debt to which the dower was subordinated is changed in form, but, in fact, remains, and the discharged security may be revived when equity so requires (*Gans v. Thieme*, 93 N. Y. 225).

The judgment of the General Term and of the Special Term should be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

NEW YORK REAL PROP. LAW, § 192. Where a person seized of an estate of inheritance in lands executes a mortgage thereof, before marriage, his widow is, nevertheless, entitled to dower of the lands mortgaged, as against every person except the mortgagee and those claiming under him.¹

§ 193. Where a husband purchases lands during the marriage, and at the same time mortgages his estate in those lands to secure the payment of the purchase-money, his widow is not entitled to dower of those lands, as against the mortgagee or those claiming under him, although she did not unite in the mortgage. She is entitled to her dower as against every other person.²

§ 195. A widow shall not be endowed of the lands conveyed to her husband by way of mortgage, unless he acquires an absolute estate therein, during the marriage.³

¹ Similar provisions are contained in the statute law of other States. Maine, Rev. Stat. (1883), c. 103, § 12; Mass. Pub. Stat. (1882), c. 124, § 5; Verm. Stat. (1894), § 2529; Ill. Ann. Stat. (1896), c. 41, § 3; Mich. Stat. (1882), § 5735; Wis. Ann. Stat.

(1889), § 2162. And see Ind. Ann. Stat. (1894), § 2652.

² Ind. Ann. Stat. (1894), § 2656; Ill. Ann. Stat. (1896), c. 41, § 4; Mich. Stat. (1882), § 5736; Wis. Ann. Stat. (1889), § 2163, *accord*.

³ Ill. Ann. Stat. (1896), c. 41, § 6.

CHAPTER I. (*Continued*)

SECTION IV.—FIXTURES

WALMSLEY *v.* MILNE

COURT OF COMMON PLEAS, 1859

(7 C. B. [N. S.] 115)

CROWDER, J., now delivered the judgment of the court:

This was an action by the assignees of a bankrupt, to recover from the defendant certain articles alleged to be part of the bankrupt's estate. It was tried before my Brother Byles at the last Spring Assizes at Liverpool, when a verdict was found for the plaintiff, with liberty to move to enter a verdict for the defendant.

The facts were these: Moore, the bankrupt, being the owner of a vacant plot of ground, in 1853 mortgaged it in fee to one Oswald, who, in August, 1858, sold to the defendant the mortgaged premises. Moore became bankrupt in September, 1858. Subsequently to the mortgage, and before the sale in 1858, Moore, who had always continued in possession, erected various buildings upon the plot of ground, and set up all the articles sought to be recovered in this action. They consisted of a steam-engine and boiler used for the purpose of supplying with sea-water the baths which had been erected on the premises; also a hay-cutter and malt-mill or corn-crusher, and grinding-stones, all (except the grinding-stones) being screwed with bolts and nuts, or otherwise firmly affixed to the several buildings to which they were attached, but still in such a manner as to be removable without damage to the buildings or to the things themselves. The upper mill-stone lay in the usual way upon the lower grinding-stone. All these fixtures were put up for the purposes of trade.

The rule was argued before my Brother Willes and Byles and myself; and in the course of the argument a great many cases were cited, which we desired time to consider before delivering our judgment.

On the part of the plaintiffs it was contended, first, that the articles in question were not fixtures at all, because not permanently

attached to the freehold, but simply movable chattels, which therefore passed to the assignees of the bankrupt;¹ or, secondly, that, if fixtures, they were trade fixtures, and therefore removable by the bankrupt, and so would pass to his assignees.

But, secondly, it was contended on the part of the plaintiffs that, assuming the articles in question to have been so affixed as not to be removable according to the general rule of law, yet that, as they were trade fixtures, they might be removed, and so would pass to the bankrupt's assignees.

The whole of the plaintiffs' argument upon this head was founded upon the well-established exception to the general rule, that, where a tenant puts up fixtures for the purpose of trade during his term, he may before its expiration, without the consent of his landlord, disunite them from the freehold. The defendant's counsel were quite ready to admit the validity of the numerous authorities supporting that proposition, and to concede to the plaintiffs, that, if the bankrupt had been tenant to the mortgagee for a term, and the bankruptcy had happened before its expiration, the fixtures in question were such as would have passed to the assignees. But they denied that any such tenancy existed in the present case. And this leads us to the consideration of the peculiar relationship existing between a mortgagor in possession and the mortgagee, which it is really difficult to express in any other legal terms. A mortgagor in possession has been called sometimes a tenant at will to the mortgagee, or a tenant at sufferance, or *like* a tenant at will: but he has never been designated as tenant for any term. Lord Ellenborough in *Thunder d. Weaver v. Belcher*, 3 East, 449, called him a tenant at sufferance; and Lord Tenterden, in *Doe d. Robey v. Maisey*, 8 B. & C. 767 (E. C. L. R. vol. 15), 3 M. & R. 107, said—"The mortgagor is not in the situation of tenant at all, or, at all events, he is not more than tenant at sufferance; but in a peculiar character, and liable to be treated as tenant or as trespasser, at the option of the mortgagee." He is clearly not a tenant at will, because he may be ejected without any notice or demand of possession, and is not entitled to the growing crops.

All the cases, therefore, which show that, where a tenant for years has put up trade-fixtures, he may remove them before his tenancy expires, have no application to the case at Bar.

In *Ex parte Belcher*, 4 Deac. & Ch. 703, which was decided in the Court of Review in 1835, it was held that fixtures annexed to the freehold after the mortgage by the mortgagor in possession, and

¹ This portion of the opinion is omitted.

which, as between landlord and tenant, would have been removable if put up by the tenant, became part of the freehold, and did not pass to the assignees of the bankrupt mortgagor. The Chief Judge (afterwards Mr. Justice Erskine) there says after adverting to the relaxation of the general rule of law in favour of trade fixtures put up by the tenant, "But that is not the present case. Again, it is said that the property in question did not pass by the mortgage deed. Now, it always appeared to me that, where the owner of the inheritance affixes property to it, it becomes a fixture in the general sense of the term, and part of the freehold; and, if the inheritance be afterwards sold or let, it goes with the freehold; and I confess I see no distinction, for this purpose, whether the deed be one of absolute conveyance, lease, or mortgage. A mortgage, therefore, made by the owner of the inheritance, will, without naming them, pass all the fixtures thereon." And, in another part of his judgment, he says: "Again, it is urged that, as to those articles which were attached after the execution of the mortgage deed, they could not pass to the mortgagee. But there has not been cited any authority, or even dictum, for such a proposition. I confess I know no case which goes so far as to determine, or even to intimate an opinion, that, where a mortgagor in possession alters the premises by addition or otherwise, the mortgagee shall not take the benefit of such alteration. I can find no distinction, therefore, substantially, between those which were affixed before and those affixed after the date of the mortgage deed. In that point of view also, I am of opinion that all the fixtures alike passed to the mortgagee."

We think, therefore, that, when the mortgagor (who was the real owner of the inheritance) after the date of the mortgage annexed the fixtures in question for a permanent purpose and for the better enjoyment of his estate, he thereby made them part of the freehold which had been vested by the mortgage deed in the mortgagee; and that, consequently, the plaintiffs, who are assignees of the mortgagor, cannot maintain the present action.

The verdict, therefore, must be entered for the defendant.

*Rule absolute.*¹

¹ *Winslow v. Merchants' Insurance Co.*, 4 Met. (Mass.) 306 (1842); *McFadden v. Allen*, 134 N. Y. 489 (1892), *accord.* So are the cases generally. But see *Clore v. Lambert*, 78 Ky. 224 (1879), *contra.*

CLARY v. OWEN

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1860

(15 *Gray*, 522)

ACTION of tort by the assignee in insolvency of Heman D. Burghardt, for the conversion of four water-wheels, with the shafts, couplings and other machinery connected with them. At the trial in the superior court the plaintiff introduced evidence of the following facts:

In 1854 Burghardt contracted with John E. Potter, who then owned certain real estate in Barrington, to furnish the water-wheels and machinery, and to set them up in wheel-pits to be prepared by Potter on the premises, for the sum of \$3,500, of which \$500 was paid at once, and the balance was to be paid on the completion of the work, in notes secured by a mortgage of the property, or by a mechanic's lien. In the latter part of 1854, Burghardt, in pursuance of this contract, constructed the wheels in question, which were made of cast-iron and placed in pairs upon cast-iron shafts, and set them up in penstocks and a flume, the frame of which rested on a stone foundation built by Potter in all respects like the foundation of a building. The wheels were intended for the purpose of driving a paper-mill on the premises; they were outside of the paper-mill building, but the mill could not be used without them.

In January, 1855, before the completion of the wheels and fixtures, the mill was destroyed by fire; Potter failed and abandoned the work; and Burghardt never fulfilled his contract and never received any payment or security, except the \$500 paid at the time of making the contract; never delivered the wheels, except in so far as setting them up as above described amounted to a delivery; never offered to return the money which he had received, and never called on Potter for any payment. When the contract was made the premises were subject to certain mortgages, which were afterwards assigned to the defendants, who had previously had notice that Burghardt claimed to own the wheels and machinery, and who, a year after the fire, took possession of the premises, which were in the condition in which the fire had left them, to foreclose the mortgages, and afterwards purchased the equity of redemption.

Upon this evidence PUTNAM, J., ruled that, the wheels having been placed on the premises after the execution of the mortgages,

the action could not be maintained. The plaintiff then offered to show that, by the agreement between Burghardt and Potter, the wheels were to remain the property of the former until completed and payment for them secured by mortgage; but the judge ruled that, even if that were proved, the plaintiff could not maintain his action, and directed a verdict for the defendants, which was returned, and the plaintiff alleged exceptions.

HOAR, J. It is conceded in the argument of the plaintiff's counsel, that the mill-wheels, for the value of which this action was brought, must be considered, as between mortgagor and mortgagee, fixtures belonging to the realty. They were essential to the operation of the mill, and were intended, when completed and paid for, to be permanently attached to the land. If the mortgagor had himself annexed them to the freehold, there could be no doubt that the mortgagee would hold them under his mortgage, and that they could not be severed without his consent (*Winslow v. Merchants' Ins. Co.*, 4 Met. 306). But it is contended that the mortgagor being in possession, and having agreed with Burghardt that the wheels should remain the personal property of the builder until they were completed and provision made for paying for them, the wheels, having been set up under this agreement, could not be claimed and held by the mortgagee.

If this position were tenable, it would follow that the mortgagor could convey to another a right in the mortgaged premises greater than he could exercise himself. But it is well settled that, although the mortgagor, for some purposes, and as to all persons except the mortgagee, may be regarded as the absolute owner of the land, yet the title of the mortgagee is in all respects to be treated as paramount. The mortgagor cannot make a lease which will be valid against the mortgagee; and if the mortgagee enter, neither the mortgagor nor his lessee will be entitled to emblements (*Pow. Mortg.*, c. 7; *Keech v. Hall*, 1 Doug. 21; *Lane v. King*, 8 Wend. 584; *Mayo v. Fletcher*, 14 Pick. 525). And we think it is not in the power of the mortgagor, by any agreement made with a third person after the execution of the mortgage, to give to such person the right to hold anything to be attached to the freehold, which as between mortgagor and mortgagee would become a part of the realty. The entry of the mortgagee would entitle him to the full enjoyment of the premises, with all the additions and improvements made by the mortgagor or by his authority.

Whether a person putting a building upon land by license of the

mortgagor, under such circumstances that it would remain his personal property as against the mortgagor, would be allowed in equity to maintain a bill to redeem, if the mortgagee should enter, is a question involving very different considerations. A tenant under a lease may redeem, to protect his interest (Rev. Sts., c. 107, § 13; *Bacon v. Bowdoin*, 22 Pick. 401).

It has been suggested that the defendants cannot avail themselves of their title as mortgagees, because they acquired the title of the mortgagor also, and therefore the mortgages are to be regarded as paid or merged. But it has been often decided that the purchaser of an equity of redemption may take an assignment of the mortgage, and may keep the legal and equitable titles distinct, at his election, if he has any interest in so doing, so that they shall not merge by unity of possession. And a release of an equity of redemption operates as an extinguishment of the equity of redemption, and not as a merger of the estate conveyed by the mortgage (*Loud v. Lane*, 8 Met. 517).

*Exceptions overruled.*¹

BRENNAN v. WHITAKER

SUPREME COURT OF OHIO, 1864

(15 Oh. St. 446)

ERROR to the district court of Lucas County.

The original action was prosecuted by the Brennans, plaintiffs, in the Court of Common Pleas of Lucas County, to recover from Whitaker and Phillips, defendants, damages for the alleged wrongful conversion by the defendants of two steam engine boilers, one large steam engine, a quantity of mill shafting, one drum, one balance wheel, the gearing for an upright saw, one muley saw and the gearing, and one pony engine.

¹ *Meagher v. Hayes*, 152 Mass. 228 (1890); *Bass Foundry Works v. Gallentine*, 99 Ind. 525 (1884); *Cunningham v. Cureton*, 96 Ga. 489 (1895) accord.

But cf. *Hunt v. Bay State Iron Co.*, 97 Mass. 279 (1879); *Porter v. Pittsburgh Steel Co.*, 122 U. S.

267 (1886). In *Hunt v. Bay State Iron Co.*, *supra*, the Massachusetts Court laid stress on the question as to whether the mortgagee had notice of the agreement and referred the case to a master "to ascertain all the facts as to notice."

The facts, as they appear in the record, are substantially as follows:

On the 9th of July, 1857, Farley & Ketcham, parties of the first part, executed a mortgage to the plaintiffs, parties of the second part, by which "the said parties of the first part, for and in consideration of the sum of \$1231.51, to them in hand paid by the said parties of the second part . . . do grant, bargain and sell unto the said parties of the second part, all and singular the goods and chattels hereinafter described, that is to say: The steam engine boilers now in the possession of said parties of the first part, designed to be used in their saw-mill in Oregon township, Lucas County, Ohio, being the same purchased by them of the said J. & J. Brennan this day, together with the engines and machinery attached to said boilers. To have and to hold all and singular the said goods and chattels hereinbefore bargained and sold, or mentioned, or intended so to be, unto the said parties of the second part forever; said goods and chattels now remaining and continuing in the possession of the said parties of the first part, in said Lucas County, Ohio."

The mortgage was given to secure the payment of the note of Farley & Ketcham to the plaintiffs, bearing the date of the mortgage, for the sum of \$1231.51, payable, with the interest, in one year, it being the amount due for the purchase money of the boilers mortgaged, and was subject to the condition that if default was made in the payment of the note according to its tenor, the plaintiffs might "enter upon the premises of the said parties of the first part at any place or places where the said goods and chattels or any part thereof may be, and take possession thereof, whether the same shall have been attached to the freehold, and in law become a part of the realty or not, and to remove the same to any place or places they may deem best, and to sell and dispose of the same."

The mortgage was filed in the office of the recorder of Lucas County, on the 9th of July, 1857, and copies, with the requisite statements, again filed by the plaintiffs in the same place each year thereafter up to the time of the commencement of this action.

After the execution of the mortgage, the boilers were put by Farley & Ketcham into a saw-mill, erected by them on land of which they were the owners in fee. They were placed in an engine house, built principally of brick, on one side of and attached to the main building of the mill. The roof of the mill extended over and formed the covering of the engine house. The boilers were placed—one end on a cast-iron frame, called the fire-front, which formed

the front of the furnace, and stood upon brick, the other end on iron stands also resting on the brick. Under the boilers were built, to support them, piers of brick, and the whole was inclosed in brick arches nearly surrounding the boilers, one end of which came up to the fire-frame, and the other was built into the end brick wall of the building. Usually the boilers are attached to the fire-front and brick work by stay bolts, but the witnesses were not able to say whether that was done in this case. The boilers could not be removed without taking down the brick work around them and a part of the building to make room for them to be taken out. To take the boilers out through the mill would not require the walls of the building to be taken down, but they could be taken out by removing a part of the wood work in front, or by making a hole in the lean-to or engine house, at the rear end of the boilers.

The engines were placed on wooden foundations and fastened to them with bolts. The large engine was in the brick building with the boilers, the other inside the main building. They were connected with the boilers by steam pipes. The main shaft was connected with the large engine by a connecting rod fastened with keys. The drum and balance wheel were placed on the main shaft and run with it. The gearing for the upright saw was connected by a belt running on the drum. The other saw connected directly with the shaft without any belt. The engines could be taken out; but there was no opening large enough to take out the fly wheel; and perhaps the drum would be too large for the doors.

The mill was completed in the fall of 1857, and was after that time occupied by Farley & Ketcham as a saw-mill, the motive power being furnished by the engine and boilers. The building was designed for a saw-mill, and in its form and structure was adapted to the business of such a mill; and, as appears from a description of the building contained in the record, it would, without material alterations and additions, be comparatively of little value for any other purpose.

There was no water power connected with the mill, and it depended wholly on steam for its power.

On the 14th of January, 1859, Farley & Ketcham executed to the defendants a mortgage upon the real estate on which the mill was located and all its appurtenances, to secure an indebtedness owing by them to the defendants. The mortgage was duly recorded in the record of mortgages of Lucas County. This indebtedness was unpaid at the time of the commencement of this action, and the defendants were in the possession of the mill. The plain-

tiffs demanded possession of the property, but the defendants refused to permit them to take it away.

The plaintiffs claim that, at the time of receiving their mortgage, the defendants had notice of the mortgage to the plaintiffs. This is denied by the defendants. On the trial the Court of Common Pleas found this issue in favor of the defendants.

Upon this state of facts and finding, the Court of Common Pleas gave judgment for the defendants.

To reverse this judgment a petition in error was filed by the plaintiffs in the district court, where the judgment was affirmed, and the plaintiffs now seek in this proceeding to reverse this action of the district court.

WHITE, J. I. The plaintiffs seek to recover for a tort arising from the conversion of the property in controversy; and, in order to establish their title to such property, as against the defendants, Whitaker and Phillips, rely upon the chattel mortgage. In order to ascertain the relation in which Whitaker and Phillips stand to this mortgage, it is proper, in the first place, to determine whether they had notice of its existence at the time they received their real estate mortgage. The issue, upon this question of notice, has been twice found in favor of the defendants, by the Court of Common Pleas, and this finding we are now asked to review, on the ground that it is against the evidence. On this point, we only deem it necessary to state that the testimony in the court below was conflicting; and while, as original triers of fact, we would have been inclined to find differently, yet we cannot say that the finding is so manifestly wrong as to warrant this court in reversing the judgment on this ground.

II. The next question is whether, as between Farley & Ketcham, the mortgagors, and Whitaker and Phillips, the mortgagees, in the real estate mortgage, the property in controversy became a part of the freehold? We are of opinion that it did. A discussion of the general principles to be regarded in determining when additions of personal property become a part of the realty, is here deemed unnecessary. The only difficulty arises in the application of these principles to the solution of particular controversies as they arise; and whether an article has been annexed to the realty so as to become a permanent accession to it, must, in a great degree, be determined by the circumstances of each particular case.

Farley & Ketcham, who made the annexations in the present case, were the owners of the fee; and the question we are now

considering arises between them, as mortgagors, and their mortgagees, Whitaker and Phillips, who, for the purposes of their security, are to be regarded as purchasers.

The building was erected for a saw-mill, and in the form and nature of its structure was adapted to the business of a mill of that description. The boilers and engines were the only motive power, and were designed so to be when the mill was built. They performed the office of a wheel and water-power, and their adaptation to the structure and the uses for which it was designed, as well as the mode of their annexation, show that they were intended to be permanent. They could not be removed without leaving the saw-mill incomplete. The building itself for any other purpose would, without material alterations and additions, be comparatively of little value. The shafting, drum, balance wheel, gearing for the upright saw, and the muley saw and gearing, though differing from the boilers and engines in the mode of annexation, yet are to be regarded as fixtures.

The mode of annexation alone does not determine the character of the property annexed; but the appropriateness of the articles named to the mill, and their necessity to its completeness, are also to be looked to.

III. The remaining question is, whether the chattel mortgage to the plaintiffs, as against the real estate mortgagees, deprives the property in controversy of the character of fixtures? The plaintiffs claim that this is the effect of the chattel mortgage; and that they have the same right to recover the property from the mortgagees (Whitaker and Phillips), without notice, as they would have had against Farley & Ketcham, if the real estate mortgage had not been given.

It is not necessary to inquire what, as against mortgagees without notice, would have been the rights of a party, other than the owner of the freehold, who might have placed in the same manner upon the premises the property in question, under some agreement with the owner, for a temporary purpose, and with the right of removal; nor as to what would have been the effect if the property had been annexed by the tortious act of Farley & Ketcham. The facts in this case raise neither of these questions, and we forbear entering into an examination of the authorities cited bearing upon them. Here it was not only the intention of Farley & Ketcham to annex the property to, and make it a part of, the freehold, but their so doing was according to the understanding of the parties when the mortgage to the plaintiffs was executed. In the mortgage it said

the boilers are "designed to be used in their (F. & K.'s) saw-mill," and power is given the plaintiffs, on default of payment, "to take possession thereof (mortgaged property) whether the same shall be attached to the freehold and in law become a part of the realty or not." The right given to the plaintiffs by the mortgage to enter upon the premises and sever the property would, doubtless, have been effectual as between the parties. But the defendants were purchasers without notice of this agreement. The filing of chattel mortgages is made constructive notice only of incumbrances upon goods and chattels. The defendants purchased and took a conveyance of real estate of which the property now in question was, in law, a part; and, in our opinion, it devolved upon the plaintiffs who sought to change the legal character of the property and create incumbrances upon it, either to pursue the mode prescribed by law for incumbering the kind of estate to which it appeared to the world to belong, and for giving notice of such incumbrance, or, otherwise, take the risk of its loss in case it should be sold and conveyed as part of the real estate to a purchaser without notice. It is true that in the case of *Ford v. Cobb*, 20 N. Y. Rep. 344, it was held that an agreement which was evidenced by a chattel mortgage was effectual against a subsequent purchaser of the land, without notice. But it seems to us to be sounder rule, and more in accordance with principle, and the policy of our recording laws, to require actual severance, or notice of a binding agreement to sever, to deprive the purchaser of the right to fixtures or appurtenances to the freehold (*Fortman v. Goepfer*, 14 Ohio St. Rep. 565; 2 Smith's L. C. 259; *Fryatt v. Sullivan Co.*, 5 Hill, 116; *Richardson v. Copeland*, 6 Gray, 536; *Frankland et al. v. Moulton et al.*, 5 Wisconsin Rep. 1).

In the case last named, the owner of a steam engine sold and assisted to annex the same to the realty, reserving a chattel mortgage on the same for a part of the purchase money; and it was held that the chattel mortgage was inoperative as against a prior mortgagee of the real estate. The mode of annexation was very similar to that existing in the case under consideration; and the holding that the chattel mortgage was inoperative as against a prior mortgagee of the real estate, as was likewise done in *Copeland v. Richardson*, *supra*, restricts the operation of agreements to sever what would otherwise be regarded as fixtures, more than is required to be done for the decision we make in the present case. Whether the restriction upon the right of removal that was applied in these cases can be properly applied in favor of a mortgagee of the real

estate claiming the property added to the premises after his mortgage as fixtures, and against a party claiming the same property as personal chattels under a chattel mortgage from the owner, when the removal would leave the realty claimed by the mortgagee as a security in as good plight as when his mortgage was taken, it is unnecessary now to inquire; and upon this question we express no opinion.

*The judgment of the district court will be affirmed.*¹

BRINKERHOFF, C. J., and SCOTT, DAY, and WELCH, JJ., concurred.

DAVENPORT v. SHANTS

SUPREME COURT OF VERMONT, 1871

(43 Vt. 546)

PETITION for foreclosure of a mortgage. The petition sets forth a mortgage, executed by John G. Shants & Co., to the petitioner, October 13, 1866, of a mill and factory and tannery in Searsburg, with 200 acres of land, and three dwelling-houses thereon. "And also the factory, then in process of erection on the site of said Searsburg tannery, with the saw-mill, water-wheels, and all the machinery and shafting in said factory," to secure a note of \$1000. The petition then sets forth the execution by Shants & Co., and the purchase by the petitioner, of another mortgage on the same premises, except the machinery, and also sets forth that the defendants, other than Shants & Co., claim an interest in said property.

The petition was taken as confessed by all the defendants, except Henry G. Root, who appeared and answered, admitting the facts set forth in the petition, or not denying them, except as follows:

That between the 3d day of August and the 27th day of October, 1866, this defendant, by his agent, Olin Scott, sold to the said John G. Shants & Co. various articles of machinery, consisting of a circular saw-mill and saw, and the belts to drive the same; the gears on two water-wheels; the upper piece of a large water-wheel shaft and box to the same; the counter-shafts to two water-wheels; the drum flanges and boxes to the said counter-shafts; and one extra saw collar; upon the condition that said machinery should be and remain the property of this defendant until the same

¹ But see *Ford v. Cobb*, 20 N. Y. 344 (1837), and *Crippen v. Morrison*, 13 (1859); *Sword v. Low*, 122 Ill. 487 Mich. 23 (1864), *contra*.

should be paid for by said John G. Shants & Co.; the whole of said machinery amounting in value to the sum of \$919.86, which they agreed to pay this defendant for the same. All of which machinery, excepting the gears and upper shaft to the large water-wheel, and the counter-shaft and boxes to the same, were in place in the factory mentioned in said petition at the time of the alleged execution of the mortgages set forth in said petition, and the said excepted articles have since said time been placed in said factory. That there has been paid to this defendant towards the purchase of said machinery the sum of \$191 only, the remainder being still due with the interest thereon.

And this defendant claims and insists that his title to said machinery is paramount to that of the said John G. Shants & Co., and to that of the petitioner, and that the petitioner has no right to a foreclosure as to said machinery or any part thereof against the defendant.

The petitioner replied, saying that he never at any time, until long after the execution of the several mortgages sought to be foreclosed by this petition, had any knowledge or notice, actual or constructive, of any contract or understanding between the defendant and the said John G. Shants & Co., by which the defendant had or claimed to have any right or claim to the saw-mill, water-wheels, and the machinery and shafting in the factory described in said mortgage; that he did, on the 13th day of October, 1866, in good faith, and relying upon the fact no that claims, liens or incumbrances existed of record upon any of the property or estate described in said mortgage, and upon the promise and assurance of both the members of said firm of John G. Shants & Co. that none existed in fact, loan to said firm the full sum of one thousand dollars, and took said mortgage in good faith to secure the payment thereof; that if it is true that the defendant did reserve such a lien upon the several articles named in his answer to said petition for foreclosure, as is in said answer stated, yet it is also true that the defendant well knew the purpose for which John G. Shants & Co. purchased the same, and the defendant then and afterwards consented that they might attach and annex said water-wheels, saw-mill, shafting and machinery to their freehold, and make the same a part of and appurtenant to said freehold, and did by his agents and workmen assist the said John G. Shants & Co. in so doing; and insists that the lien created by his said mortgage is paramount to any lien or claim of the defendant to the saw-mill, water-wheels, machinery and shafting in said factory.

STIPULATION.—It is hereby stipulated that this cause shall stand for hearing upon petition, answer, replication, affidavits of Olin Scott and H. W. Scott, statement of facts, and notes and mortgages set forth in the petition. The facts stated in the answer are admitted to be true, excepting as varied or qualified by the replication in connection with the affidavits and statement of facts. The facts stated in the replication are admitted to be true, excepting as varied or qualified by the affidavits and statement of facts, and excepting that the averment respecting annexing "to the freehold of the said John G. Shants & Co., and make the same a part of, and appurtenant to said freehold," is not to be taken as an averment of facts, but as a conclusion of law. The facts stated in the affidavits and statement are admitted to be true.¹

At the September term, 1868, decree, *pro forma*, foreclosing mortgage against all defendants, except Henry G. Root, and dismissing the petition as to Root, with costs. Appeal by petitioner.

PECK, J. The bill having been taken as confessed as to all the defendants, except Henry G. Root, and he alone defending, the only question is as to the right of the orator, under his mortgage from Shants & Co., to that portion of the property sold conditionally by Root to the said mortgagors.

The bill, and answer of Root, in connection with the written stipulation of the parties on file, leave no dispute as to the material facts in the case, and no time need be spent in repeating the facts thus agreed.

It must be regarded as settled as a general rule in this State that a party may sell and deliver personal property under a condition that it shall remain the property of the vendor until the price is paid; and that under such contract the title will remain in the vendor until the condition is complied with, both as between the vendor and such conditional vendee, and also as between the original vendor and a *bona fide* purchaser without notice from such conditional vendee. The only question is whether the facts of this case take it out of the general rule.

¹ The affidavits and formal statement, dealing with the mode of annexation of the fixtures, are omitted. The statement concludes that "all the machinery mentioned above, including the water-wheels and appendages, were placed in the factory, which is a large two-story building,

33 x 90 feet, by John G. Shants & Co., for the purpose of prosecuting the business of manufacturing lumber, chair stock, etc., and is connected with and attached to the building, as machinery of that character usually is."

The proposition of the counsel of the defendant Root is, that the whole property sold conditionally by Root to Shants & Co. was personal property as well after as before the sale, and cannot properly be claimed as fixtures or as parts of the realty. But we think as between mortgagor and mortgagee, if the title of the mortgagor were absolute, the defendant's proposition is not correct; and that under the recent decisions in this State, on being put in place in the mill and factory, as shown in this case, it became so far annexed to the realty as to pass under a mortgage of the real estate. But still the question remains as between the mortgagee under his mortgage, and the original owner under his conditional sale to the mortgagor, which has the paramount right.

First, as to that portion of the property which had been put in place in the mill and factory by the mortgagors after they thus purchased it of Root, and which was in the building and thus annexed at the time the orator took his mortgage: As to this property, the orator, as it appears, having advanced his money and taken his mortgage in good faith, without notice of any lien or incumbrance upon it, and from its condition having reason to suppose that the mortgagors' title to this property in question was the same as his title to the realty to which it was annexed, and of which it was apparently parcel, seems to have a strong equity in his favor. While, on the other hand, the defendant Root, the unpaid vendor, who endeavored to secure himself by stipulation in the sale that he should hold the title till paid, ought not to be deprived of this security without some substantial reason. But the defendant Root must have understood when he sold the property to Shants & Co. that they intended to put the property to use in advance of the payment of the price; and from the kind and nature of the property he must have expected that in its use it necessarily must be annexed to the realty substantially in the manner in which it was, and thereby become apparently parcel of the realty. What he knew or had reason to suppose and did suppose was to be done with the property he must be taken to have consented to, as he did not object. Root, therefore, having, by implication at least, if not expressly, consented that the property might be incorporated with the realty of Shants & Co. in the manner it was, and they thereby become clothed with the apparent title as incident to their record title to the real estate, whereby the mortgagee was misled and induced to part with his money on the credit of the property, the equity of the mortgagee is paramount to that of the conditional vendor. Justice and equity, as well as sound policy, require this

limit to the rights of a conditional vendor as between him and an innocent purchaser or mortgagee of real estate without notice who advances his money on the faith of a perfect title.

But as to that portion of the property mentioned in the answer of the defendant Root and in the agreed statement of facts on file, which had not been placed in the mill or factory at the time of the execution of the mortgage to the orator, but was in the yard and put in place in the factory or mill afterwards, the right of the defendant Root is paramount to the right of the orator. That, not having been annexed to the realty at the date of the mortgage, would not pass as incident to the realty; and the mortgage did not divest Root of his title. It having been placed in the building by the mortgagors after the execution of the mortgage, the mortgagee might hold it as against them, but not as against Root, the conditional vendor. As to this portion of the property the mortgagee was not misled, and advanced nothing on the faith of it.

The decree of the Court of Chancery is reversed, and cause remanded for a decree of foreclosure for orator against all the defendants as to all the property, except that defendant Root have a right to that portion of the property, or the value thereof, not in place in the factory or mill at the time of the execution of the mortgage to the orator, but put in afterwards, the orator having his election to pay to Root the value of it, or have it excepted in the decree so far as Root is concerned, with liberty to Root to remove it within such reasonable time as the Court of Chancery shall fix for that purpose.¹

TIFFT v. HORTON

COURT OF APPEALS OF NEW YORK, 1873

(53 N. Y. 377)

APPEAL from judgment of the General Term of the Superior Court of Buffalo, affirming a judgment in favor of the plaintiffs, entered upon the verdict of a jury.

This action was brought to recover damages for the alleged conversion of a boiler and engine.

¹ *Buzzell v. Cummings*, 61 Vt. 213 (1888); *Haven v. Emery*, 33 N. H. 66 (1856); *Wickes v. Hill*, 115 Mich. 333 (1897), *accord*. And see *Knowlton v. Johnson*, 37 Mich. 47 (1877), and *Lansing Iron Works v. Walker*, 91 Mich. 409 (1892). Cf. *Campbell v. Roddy*, 44 N. J. Eq. 244 (1888).

The plaintiffs, under a written contract, manufactured the engine and boiler in question, with other machinery, for Mrs. Jane Coombs Brown, to be put up and used in a new elevator which Mrs. Brown was building, in the city of Buffalo. By the terms of the contract, Mrs. Brown was to give for a portion of the purchase-price of the boiler, engine and other machinery her two promissory notes, to be secured by a mortgage on the boiler and engine. The notes and mortgages were to be executed and delivered so soon as the engine and boiler were complete in the plaintiffs' shop, ready to be put up at the elevator. The boiler and engine and other machinery were completed according to the contract; and while in the plaintiffs' shop the mortgage was given as provided in the contract. It was provided in the mortgage that the engine and boiler should be and remain personal property until the notes mentioned in it were fully paid, notwithstanding the manner in which they should be placed in the elevator. The mortgage recited the fact that the engine and boiler were made to be put up in the elevator of Mrs. Brown, pursuant to the agreement above mentioned, and authorized the plaintiffs, in case of a breach of its condition, to enter the elevator and take and carry the boiler and engine away. Mrs. Brown failed to pay the second note secured by the mortgage. The boiler and engine were not put in the elevator building, but on a foundation made for them outside of the building; and a building called the engine-house was built over them after they were set up. After the mortgagor failed to pay the note, plaintiffs went to take the boiler and engine, and, finding the defendants in possession, demanded them. The defendants claimed to own them, and refused to let the plaintiffs have them. The defendants claimed title to the engine and boiler through three real estate mortgages, executed by Mrs. Brown before the boiler and engine were set up on the premises. These mortgages had been foreclosed, and the premises sold under judgments obtained in the foreclosure actions, and the premises bid off by and conveyed to the defendants. The rights of the parties, by stipulation before sale, were not to be affected by the sales on the judgments in the foreclosure actions. The defendants asked the court to decide, as matter of law, that there was not any evidence of a conversion by the defendants of the boiler and engine. This the court declined to do. The defendants requested the court to decide that the boiler and engine were a part of the realty, as between the parties to this action, notwithstanding the written agreement. The court refused so to decide. The jury rendered a verdict in favor

of the plaintiffs for the sum of \$5,141.88, and judgment was entered thereon.

FOLGER, J. It is well settled that chattels may be annexed to the real estate and still retain their character as personal property. See *Voorhees v. McGinnis*, 48 N. Y. 278, and cases there cited. Of the various circumstances which may determine whether in any case this character is or is not retained, the intention with which they are annexed is one; and if the intention is that they shall not by annexation become a part of the freehold, as a general rule they will not. The limitation to this is where the subject or mode of annexation is such as that the attributes of personal property cannot be predicated of the thing in controversy (*Ford v. Cobb*, 20 N. Y. 344), as where the property could not be removed without practically destroying it, or where it or part of it is essential to the support of that to which it is attached (*id.*).

It may in this case be conceded that if there were no fact in it but the placing upon the premises of the engine and boilers in the manner in which they were attached thereto, they would have become fixtures, and would pass as a part of the realty. But the agreement of the then owner of the land and the plaintiff is express, that they should be and remain personal property until the notes given therefor were paid; and by the same agreement power was given to the plaintiffs to enter upon the premises in certain contingencies and to take and carry them away. While there is no doubt but that the intention of the owner of the land was that the engine and boilers should ultimately become a part of the realty and be permanently affixed to it, this was subordinate to the prior intention expressed by the agreement. That fully shows her intention and the intention of the plaintiffs that the act of annexing them to the freehold should not change or take away the character of them as chattels until the price of them had been fully paid. And as parties may by their agreement, expressing their intention so to do, preserve and continue the character of the chattels as personal property, there can be no doubt but that as between themselves the agreement in this case was fully sufficient to that end.

But it is contended that where in the solution of this question the intention is a criterion, it must be the intention of all those who are interested in the lands; and that here the defendants, prior mortgagees of the real estate, were interested, and have not expressed nor shown such intention. It is not to be denied that, as a general rule, all fixtures put upon the land by the owner thereof,

whether before or after the execution of a mortgage upon it, become subject to the lien thereof. Yet I do not think that the prior mortgagee of the realty can interpose before foreclosure and sale to prevent the carrying out of such an agreement as that in this case. Had the mortgagees taken their mortgage upon the lands after the boilers and engine had been placed thereon under this agreement, they would have had no right to prevent the removal of them by the plaintiffs on the happening of the contingencies contemplated by it. The rights of a subsequent mortgagee are no greater than those of a subsequent grantee; and he, it is held, cannot claim the chattels thus annexed, and must seek his remedy for their removal by virtue of such an agreement upon the covenants in his conveyance of the lands (*Mott v. Palmer*, 1 N. Y. 564; and see *Ford v. Cobb*, *supra*).

A prior mortgagee who certainly has not been induced to enter into his relation to the lands by the presence thereon of the chattels in dispute subsequently annexed thereto has no greater right than a subsequent mortgagee. Neither could claim as subject to the lien of his mortgage personal property brought on to the premises with permission of the owner of the lands and not at all affixed thereto. Nor can either claim personal property as so subject from the mere fact of the affixing, where by the express agreement of the owner of the fee and the owner of the chattel its character as personal property was not to be changed, but was to continue, and is to be subject to a right of removal by the owner of the chattel on failure of performance of conditions. The language of the authorities is that the chattel in such case is personal property, for which an action of trover for the conversion of it may be maintained (*Smith v. Benson*, 1 Hill, 176; *Mott v. Palmer*, *supra*; *Farrar v. Chauffetete*, 5 Den. 527; *Ford v. Cobb*, *supra*).

Another consideration makes it clear, I think, that in this case the absence of a concurrent intention on the part of the prior mortgagees is of no weight. As above stated, as a general rule, all fixtures put upon lands by the owner thereof become a part thereof and subject to the lien of a prior mortgage; but sometimes it is doubtful if they have been so annexed as to so become. And then, it is said, the question may be decided by the presumed intent of the party making the annexation of the chattels (*Winslow v. Mer. Ins. Co.*, 4 Metc. 306). The law makes a presumption in the case of any one making such annexation, and it is different as the interest of the person in the land is different, that is, whether it is temporary or permanent. The law presumes that because the interest

of a tenant in the land is temporary, that he affixes for himself with a view to his own enjoyment during his term, and not to enhance the value of the estate; hence, it permits annexations made by him to be detached during his term, if done without injury to the freehold and in agreement with known usages. The law presumes that because the interest of the vendor of real estate who is the owner of it has been permanent, that he has made annexations for himself, to be sure, but with a view to a lasting enjoyment of his estate and for its continued enhancement in value. So the mortgagor of land is the owner of it, and has a permanent interest therein, and the law presumes that improvements which he makes thereon by the annexation of chattels he makes for himself for prolonged enjoyment and to enhance permanently the value of his estate (*Winslow v. Mer. Ins. Co.*, *supra*). These are presumptions of the intention of the tenant alone, the vendor alone, and of the mortgagor alone; nor are they ordinarily concerned at all with the relation to the lands, or with the purpose of the landlord or the vendee or the mortgagee; though there may be cases in which the intention of both parties may be of effect, as where a mortgagee has loaned money with the understanding that it shall be applied to enhance the value of the estate by the addition of chattels in such manner. And they are but presumptions, which in all cases may be entirely done away with by the facts (*Lancaster v. Eve*, 5 C. B. [N. S.] 717). So in *Elliott v. Bishop*, 10 Exch. 496; s. c. in error, 11 Exch. 113, it is recognized that the express agreement of a tenant may prevent him from the exercise of his right to detach his annexations, which is the same as to say that his agreement having shown that it was not his intention to remove them, the presumption of contrary purpose which would otherwise arise is repelled. So in *Potter v. Cromwell*, 40 N. Y. 287, and cases cited, it is conceded that if the intention of the vendor of lands be to retain in chattels annexed thereto their character as personal property, such intention will prevail. So in *Voorhees v. McGinnis*, *supra*, it is conceded that if the intention of the mortgagor of lands had been that chattels annexed were to be removable, the prior mortgagee could not have held them against the receiver of the goods, &c., of the mortgagor. See also *Crane v. Brigham*, 11 N. J. Eq. (3 Stockton), 29, 35; *Teaff v. Hewitt*, 1 Ohio St. (McCook), 511-531. The general rules governing the rights of parties in chattels thus annexed to the real estate rest, as it appears, upon the presumptions which the law makes of what their purpose is in the act of annexation. This presumption grows out of their

relation to and interest in the land, and not from the relation or interest in it of others which may be opposite. And as the presumption of their purpose grows alone out of their relation and interest, it is repelled by whatever signifies a purpose different; not a different purpose in those holding a relation which may become hostile, but their own different purpose. Hence, I conclude that the agreement of the owner of the land with the plaintiffs, as it did fully express their distinct purpose that these annexations of boiler and engines should not make them a part of the real estate, was sufficient to that effect without any concurring intention of the defendants as prior mortgagees.

Though the defendants became the purchasers of the land on the foreclosure of the mortgages, and were the owners of it in fee, and probably in actual possession of it, and of the boilers and engines annexed to it, before this action was brought or demand made of them for these chattels, yet they are to be considered in this case only as prior mortgagees of it. Such is the effect of the stipulation made by them that the sale upon the decrees should not in any manner change the legal rights of the plaintiffs in this action; but for this it would have been necessary to have determined the effect upon the rights of the parties of the sale on foreclosure and the change of title and possession of the lands, and the application to that state of facts of the principle laid down in *Lane v. King*, 8 Wend. 584, and kindred cases.

It appears that the boilers and engine cannot be removed without some injury to the walls built up about them, and which are a part of the real estate; yet this fact will not debar the plaintiffs. The chattels have not become a part of the building; the removal of them will not take away or destroy that which is essential to the support of the main building or other part of the real estate to which they were attached; nor will it destroy or of necessity injure the chattels themselves; nor will the injury to the walls about them be great in extent or amount. So that the limitation hereinbefore stated does not apply.

It is proper to add that the English case cited and much relied upon by the defendants has not been overlooked (*Walmsley v. Milne*, 7 C. B. [N. S.] 115). I do not gather from it that the decision was placed upon the ground (as the defendants claim) that the mortgagee of the land did not expect or understand that the chattels annexed were removable or to be removed. The opinion of the court seems summed up in the concluding sentence: "We think, therefore, that when the mortgagor (who was the real

owner of the inheritance) after the date of the mortgage annexed the fixtures in question for a permanent purpose and for the better enjoyment of his estate, he thereby made them a part of the freehold which had been vested by the mortgage deed in the mortgagee." It is to be borne in mind, too, that in England and in Massachusetts the rights of a mortgagee of land in the mortgaged premises are greater than in this State. He is regarded as the owner and the mortgagor in the light of a tenant. So that things annexed to the land become fixtures upon the land of the mortgagee, as it were. See case last cited, page 133; *Butler v. Page*, 7 Metc. 40.

The judgment should be affirmed, with costs to the respondents. All concur.

*Judgment affirmed.*¹

REYNOLDS v. ASHBY & SON

HOUSE OF LORDS, 1904

(*L. R.* [1904] *A. C.* 466)

HOLDWAY, the lessee of land in Reading for ninety-nine years from 1892, was in April, 1900, building a factory thereon for a joinery business. On April 7 Holdway mortgaged the premises to Burrows, "together with the buildings, fixtures, machinery and fittings erected thereon." Holdway afterwards executed a second mortgage to Hatt, and on August 27 a third mortgage to the respondents.

On August 30 Holdway and the appellant (a manufacturer of machines) made a hire-purchase agreement, whereby the appellant agreed to let machinery to be used in the factory, and Holdway agreed to hire and to pay for it by instalments at specified times, the machinery to become the property of Holdway as soon as the payments were all duly made, but if default was made in punctual payment of any of the instalments Holdway might determine the

¹ *Duffus v. Howard Furnace Co.*, 8 App. Div. (N. Y.) 567 (1896); *Eaves v. Estes*, 10 Kans. 314 (1872); *Cochran v. Flint*, 57 N. H. 514 (1877); *First National Bank v. Elmore*, 52 Iowa, 541 (1879); *Campbell v. Roddy*, 44 N. J. Eq. 244 (1888); *Brinkley v. Forkner*, 117 Ind. 176 (1888); *Warren v. Liddell*, 110 Ala. 232 (1895); *Willis v. Munger Machine Co.*, 13 Tex. Civ. App. 677 (1896), *accord*. And compare *McFadden v. Allen*, 134 N. Y. 489 (1892), and *Brannon v. Vaughan*, 66 Ark. 87 (1898). See also note, 13 Col. Law Rev. 247-249 (1913).

hiring and enter and resume possession of the machinery, which was to continue to be the sole and absolute property of the appellant until the last payment was made.

In September the machines—heavy carpenter's tools—were put up on the ground floor of the factory (in the words of Lord Lindley's judgment) "on beds of concrete prepared for them. The machines were worked by steam power transmitted from a steam engine by shafts, wheels, and gearing in the usual way. Each machine was complete in itself. Each was fastened down to its concrete bed by bolts and nuts. The bolts were firmly fixed in the concrete and passed through and projected beyond holes in the machine. The nuts were screwed on the ends of the bolts where they projected, and the machines were thus held fast. By unscrewing the nuts each machine, although heavy, could no doubt be raised up and removed without injury to the building containing it, and without injury to its concrete bed and to the bolts embedded in it."

In November Hatt took possession of the premises under his mortgage, and Holdway having made default in payment the appellant gave him notice determining the hiring and demanding the return of the machinery. In December the respondents took transfers of the prior mortgages, having bought up the mortgagees' interests. The respondents having refused to deliver up the machinery the appellant brought this action against them, claiming the machinery or damages. Lawrance, J., who tried the action did not leave any question to the jury and entered judgment for the defendants. This decision was affirmed by the Court of Appeal (Collins, M. R., Romer and Mathew, L. JJ.) [1903] 1 K. B. 87. Hence this appeal.¹

LORD JAMES. My Lords, it must be taken that the appellant was aware that the machines would be used in a factory and would be affixed in the usual manner to the building.

In the first instance I was disposed to think that the question of chattel or fixture, being one of fact, ought necessarily to have been submitted to the jury, but apparently the course taken by the learned judge in treating the question as one of law, or as one of fact upon which the jury were bound to accept his directions and apply the law as declared by him, was correct, and certainly was acquiesced in by both parties to the suit.

¹ Concurring opinions of the EARL of HALSBURY, L. C., and of LORDS MACNAGHTEN and LINDLEY are omitted.

The manner in which the machines were affixed to the buildings has been clearly brought to the notice of your Lordships, and is shewn by some sketches set out in the case. This affixing of the machines is to obtain steadiness, and effects the usual condition under which such machines are used.

My Lords, the authorities controlling the questions respecting the difference between fixtures and chattels are very numerous, and have arisen between different parties. The rights of landlord or tenant, of mortgagor or mortgagee, and liability to being rated, have all brought this question to a legal issue for the determination of our Courts.

I do not propose to review those authorities in detail, but having consulted and considered them, I have come to the conclusion that the weight of authority is in favour of the view that these machines must be held to be affixed to the building so as to pass under the mortgage as being a portion of the factory.

The cases supporting this view are very numerous, but the principal case now generally referred to is that of *Hobson v. Gorringe*, [1897] 1 Ch. 182, the authority which Lawrance, J., acted upon. Doubtless there are cases and dicta upon which the appellants are entitled to rely. *Hellawell v. Eastwood*, 6 Ex. 295, and several other cases were relied upon at the bar to show that these machines should be regarded as chattels—but in none of these cases did the question arise between mortgagor and mortgagee, and in some of them the decisions are explained upon grounds other than those existing in the present case.

My Lords, it was argued at the bar that as Holdway had not paid for the machines they remained the property of the appellant, and could not by any act of Holdway be dealt with as fixtures, but the argument cannot, I think, prevail. The machines were sold by the appellant for the purpose of being used in the manner in which they were used. In order so to use them it was necessary that they should be fixed, and so become part of the building.

For these reasons I feel that, following a great preponderance of authority, your Lordships' judgment should be in favour of the respondents.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

STONE *v.* LIVINGSTON

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1915

(222 *Mass.* 192)

PIERCE, J. The plaintiff, as trustee in bankruptcy of Dennis D. O'Connell, sues the defendant in tort for the conversion of forty-nine looms and the dressing, or preparatory weaving, dyeing and finishing machinery contained in the mill of O'Connell on July 30, 1913, the day he was duly adjudicated bankrupt. On August 7, 1913, the defendant, in foreclosure of a real estate mortgage given him by O'Connell on January 8, 1913, duly sold the estate and property definitely described therein, as also the property alleged to have been converted by the sale, under the claim that it was to be treated as real estate and as such was included though not specifically mentioned, in the mortgage.

The estate described in the mortgage was purchased in 1900 by George J. Daniels and the bankrupt Dennis D. O'Connell, and thereafter was held by them as copartners until the dissolution of the firm in 1903, at which time O'Connell acquired the entire firm title. The description of the estate and property conveyed was identical in its terms to that thereafter used in the deed of Daniels to O'Connell and in the mortgage deed of O'Connell to the defendant Solomon H. Livingston, dated January 8, 1913, and read as follows: "That certain tract or parcel of land with the buildings thereon and all the privileges and appurtenances thereto belonging situated . . . and including with the real estate hereby conveyed and as a part thereof the engine, fixed shafting, dynamo, main belt, pump, electric-light wiring, thermostats and sprinklers now on and attached to the premises, including steam piping." The fact that the articles enumerated in the schedule following the description of the land included all property at the time of the conveyance upon the premises not in its nature realty, and the further fact that there was no machinery there for a worsted mill, leads to the conclusion that the purpose of the deeds was not to exclude a grantee's possible claim that the effect of the conveyance was to transfer the title to other property, but on the contrary was intended to remove from the realm of discussion the articles scheduled and to place them within the conveyance. Following the purchase of the plant the firm acquired by bill of sale a conditional title to

and possession of thirty-two second hand looms not made especially for the business of the firm but such as are usually carried in stock.

These machines, each weighing from twenty-eight hundred to three thousand pounds, were fastened to the floor by lag screws to keep them stationary and to prevent them from wobbling "all over the floor." Lag screws are six, eight or ten inches long, one quarter of an inch to two inches in diameter, and are like ordinary screws with the exception of the head, which is made of wrought iron. The looms and other machinery in controversy could be removed without any damage to themselves or to the building in which they were contained. The looms and other machinery were necessary to the conduct of a worsted mill, but were just as suitable for use in any other mill as in the firm's mill.

Much of the machinery other than the looms was as heavy, or heavier, than the looms, was attached in like manner to the floor, and the firm's right thereto was acquired by conditional sale.

On January 29, 1903, Daniels, in addition to his deed of the real estate, sold to O'Connell by bill of sale, "all the machinery and stock raw and wrought and in process—all finished goods and all personal property of every kind and description to which I have any title by virtue of the partnership." Between January 29, 1903, and January 8, 1913, O'Connell purchased new machinery in replacement of the old, to some extent, as also sixteen new looms, ten of which were held under such rights as are conferred upon a grantee by a conditional sale. At the execution of the mortgage to the defendant at least twenty of the forty-nine looms in the mill were subject to the terms and conditions of conditional sale, as was also an undefined portion of the other machinery. None of the machinery was put into the mill after the execution of the mortgage deed to the defendant. Whether the defendant had or had not knowledge of the conditional nature of his mortgagor's interest in the machines does not appear.

At the close of the evidence the plaintiff contended that the court ought to rule, as matter of law, that the machinery in controversy did not pass by the mortgage, and that a verdict should be directed for the plaintiff for \$4,400 [the agreed value of the property in controversy] with interest from July 18, 1913, the date of the entry to foreclosure. The defendant contended that the court should rule as matter of law that the machinery in controversy was real estate and that a verdict should be directed for the defendant.

The presiding judge gave to the jury full and accurate instruc-

tions defining the nature of real and personal property, to which no exceptions were taken. He then submitted to the jury this question: "Was the machinery in question real estate or personal property?" to which the jury made answer, "Personal property."

Therefore the judge directed a verdict for the plaintiff for \$4,400 and interest, and reported the case to this court; judgment "to be entered upon the verdict, or for the defendant, or a new trial ordered as the case requires."

It is clear that the decisions fall into some one of three classes:

1. Those where the chattel has been so affixed that its identity is lost, or so annexed that it cannot be removed without material injury to the real estate or to itself. *Pierce v. Goddard*, 22 Pick. 559.

2. Those articles which are manifestly furniture as distinguished from improvements. *Southbridge Savings Bank v. Mason*, 147 Mass. 500, 505; *Hook v. Bolton*, 199 Mass. 244, 247.

As regards these two classes the facts rebut all other evidence of intention to the contrary.

3. Those cases where intention is the controlling fact and where such fact is to be determined upon consideration of all the circumstances, including therein the adaptation to the end sought to be accomplished and the means, form and degree of annexation. "It is an intention which settles, not merely his own rights, but the rights of others who have or who may acquire interests in the property. They cannot know his secret purpose; and their rights depend, not upon that, but upon the inferences to be drawn from what is external and visible. In cases of this kind every fact and circumstance should be considered which tends to show what intention, in reference to the relation of the machine to the real estate, is properly imputable to him who put it in position." *Hopewell Mills v. Taunton Savings Bank*, 150 Mass. 519, 522.

In the case at bar it properly could not have been ruled that the machines had been so affixed to the real estate or to other chattels which were to be treated as real estate (*Hopewell Mills v. Taunton Savings Bank*, *supra*), that they had lost their identity or had become incapable of removal without material injury to themselves or to the building to which they were attached. Nor could it have been ruled that they were not to be treated as real estate but were chattels. In view of the undisputed fact that the machines were not especially designed for use upon the premises, were not peculiar in their pattern, were easily removable without injury to themselves or to the structure in which they were placed, were

equally adapted for use in any other worsted mill, were purchased and sold from stock, were in large part held by the mortgagors upon a conditional sale title, were put into the mill before the execution of the mortgage to the defendant; in view also of the fact of the silence of the record upon the matter of the mortgagee's knowledge or ignorance of the quality of his mortgagors' title, and of the further fact that as between the members of the firm the machinery was treated as chattels when, upon the dissolution of the firm, Daniels sold to O'Connell by bill of sale "all the machinery" and at the same time gave a deed of all his interest in the real estate, and, upon all the reported testimony, we are of opinion that a question of fact was presented and that it was properly submitted to the jury. *Maguire v. Park*, 140 Mass. 21. *Carpenter v. Walker*, 140 Mass. 416, 420. *Smith v. Bay State Savings Bank*, 202 Mass. 482.

We find no error in the admission or rejection of testimony prejudicial to the defendant.

In accordance with the terms of the report judgment is to be entered upon the verdict.

*So ordered.*¹

¹ In *Central Union Gas Co. v. Browning*, 210 N. Y. 10 (1913), held, mortgagee secured no right to gas ranges as fixtures, but they remained personal property.

CHAPTER I. (*Continued*)

SECTION V.—WASTE AND REPAIR

KING *v.* SMITH

HIGH COURT OF CHANCERY, 1843

(2 *Hare*, 239)

W. SMITH conveyed and surrendered certain freehold and copyhold estates to the use of J. Reid and his heirs, by way of mortgage, to secure £2700 and interest. W. Smith, by his will, gave all his real and personal estate to the defendant, S. Smith (who was also his heir-at-law, customary heir, and sole executor), "in hopes that he might be able to pay his (the testator's) just debts, and find a surplus for his trouble." J. Reid devised his legal interest in the mortgaged premises to the plaintiffs, and appointed them his executors. The plaintiffs, by their bill, charged that the mortgaged premises were a "scanty security" for the principal and interest due, and that the plaintiffs were entitled and claimed to be specialty creditors upon the general estate of the mortgagor for the deficiency, and that, to ascertain the same, the mortgaged premises ought to be sold. The bill prayed an account of the mortgage debt, a sale accordingly, and payment out of the proceeds; and if the same were insufficient, that the plaintiffs might be declared to be specialty creditors upon the estate for the deficiency; that, if necessary, the suit might be taken as being on behalf of the plaintiffs, and all other the unsatisfied creditors of W. Smith, and the personal and real estate duly administered and applied.

After appearance and before answer the plaintiffs filed their supplemental bill, stating that, since the original bill was filed, the defendant had felled, and was proceeding to fell and carry away large numbers of timber and timber-like trees which were growing on the mortgaged premises, that many of such trees were lying upon the lands, and had been advertised for sale, and praying an account of the trees felled, and of the monies produced by the sale,

and an injunction to restrain the felling and sale of trees from the mortgaged premises.

The plaintiffs moved for the injunction, according to the prayer. VICE-CHANCELLOR [WIGRAM]. It is now an established rule that if the security of the mortgagee is insufficient, and the court is satisfied of that fact, the mortgagor will not be allowed to do that which would directly impair the security—cut timber upon the mortgaged premises. It has been argued that if the bill be for a foreclosure, when the mortgagee seeks to take the whole estate, the court will not prevent him [the mortgagor], pending that suit, from cutting timber or receiving rents, or doing any other act incident to the ownership; but that, if the plaintiff sued as a general creditor, the court would give him the relief by injunction. That, however, is not the distinction. The rule would be rather the other way. The plaintiff, in a foreclosure suit, asks nothing more than the estate, whilst the plaintiff, in creditors' suit, seeks the application, not only of the mortgaged estate, but, if necessary, of the general estate also, in payment of his debt. It is very difficult to suppose that a mere creditor can have any such right as the argument assumes. On what principle is the executor and trustee of real estate to be restrained at the suit of a general creditor from acting according to his judgment in the management of the property?

I think the allegation in the bill, that the mortgaged premises are a scanty security for the debt, is a sufficient foundation for admitting evidence of the value of the estate.

VICE-CHANCELLOR. The cases decide that a mortgagee out of possession is not of course entitled to an injunction to restrain the mortgagor from cutting timber on the mortgaged property. If the security is sufficient, the court will not grant an injunction merely because the mortgagor cuts, or threatens to cut, timber. There must be a special case made out before this court will interpose. The difficulty I feel is in discovering what is meant by a "sufficient security." Suppose the mortgage debt, with all the expenses, to be £1000, and the property to be worth £1000, that is, in one sense, a sufficient security; but no mortgagee who is well advised would lend his money unless the mortgaged property was worth one-third more than the amount lent at the time of the mortgage. If the property consisted of houses, which are subject to many casualties to which land is not liable, the mortgagee would probably require more. It is rather a question of prudence than of actual value.

I think the question which must be tried is whether the property the mortgagee takes as a security is sufficient in this sense—that the security is worth so much more than the money advanced that the act of cutting timber is not to be considered as substantially impairing the value, which was the basis of the contract between the parties at the time it was entered into. I have read the affidavit, and I cannot find that either the rental or income of the property appears; but it seems that the substantial part of it consists of houses, which might make it a more serious question whether the court should permit the mortgagor to cut the timber. The supplemental bill, which states the circumstances with respect to the timber and prays the injunction, contains no case with reference to the insufficiency of value, nor does the plaintiff, by his affidavit, make any such case. The bill and affidavit appear to proceed on the supposition that the mortgagor has no right to cut the timber under any circumstances. In the valuation which is attempted to be shewn, I am not told the quantity of the land, or the rental; nor can I discover of what class the houses are, or whether they are tenanted or not, or what is the nature of the property generally.

It is stated, on the defendant's affidavits, that he did not cut any of the trees with the intention of injuring the estate, but on the contrary he did it in the due and proper course of husbandry and management. What is meant by felling twenty-one large elm trees in due course of husbandry, I cannot comprehend. It is obvious that the defendant is using language of which he does not know the effect. There being, however, no abstract right on the part of a mortgagee to say that the mortgagor shall not cut timber, I am satisfied that there must be clearer evidence of the value before me, or I cannot grant the injunction.

Let the motion stand over, with liberty to apply. If the defendant proceeds to cut more timber, the plaintiff can renew his application, and bring before me a case upon which I can adjudicate, and then the costs of this motion will be disposed of. I should be very reluctant to decide it without knowing what is the actual value of the security which has been accepted by the mortgagee, or whether he is really secured or not.¹

¹ This represents the general rule in this country: *Brady v. Waldron*, 2 Johns. Ch. 148 (1816); *Fairbank v. Cudworth*, 33 Wis. 358 (1873); *Emmons v. Hinderer*, 24 N. J. Eq. 39 (1873); *Triplett v. Parmlee*, 16 Neb.

649 (1884). (*semble*); *Moriarty v. Ashworth*, 43 Minn. 1 (1890). That the right to an injunction to restrain waste by the mortgagor is absolute, see *Nelson v. Pinegar*, 30 Ill. 473 (1863).

PETERSON v. CLARK, 15 Johns. 205 (1818). PER CURIAM. There can be no doubt but that the deed from Van Camp to Clark, and defeasance given back, amounted only to a mortgage, and the simple question then is, whether a mortgagee can maintain an action of waste against the mortgagor, before the forfeiture of the mortgage; for the waste alleged to have been committed in this case was before the expiration of the time limited for the payment of the money secured by the mortgage. Indeed, the present suit was commenced before that time. Waste is an injury done to the inheritance, and the action of waste is given to him who has the inheritance in expectancy, in remainder, or reversion; but it is expressly laid down by Blackstone (3 Bl. Com. 225), that he who hath the remainder for life only is not entitled to sue for the waste, since his interest may never, perhaps, come into possession, and then he has suffered no injury. So, likewise, with respect to the mortgagee, especially when the mortgage is not forfeited, his interest in the land is contingent, and may be defeated by payment of the money secured by the mortgage; and it must follow, as matter of course, that he has not such interest in the timber as to sustain an action of trover. The judgment of the court below must be reversed.

STOWELL v. PIKE

SUPREME JUDICIAL COURT OF MAINE, 1823

(2 Greenl. 387)

IN an action of trespass quare clausum fregit, the case was thus: The plaintiff, by his deed dated September 15th, 1819, bargained and sold the close described in the writ to one Bickford, in fee, taking from Bickford, at the same time, a mortgage of the same land, to secure the payment of the purchase money, for which Bickford also gave his notes of hand to the plaintiff, amounting to three hundred and thirty dollars, payable at different periods in the course of two years and a half, with interest. In the course of the spring following, Bickford paid his first instalment; and, in December, 1820, he sold all the timber then standing on the premises, to the value of two hundred and thirty dollars, to the defendant, Pike, and others, who, with the other defendants in their employment, without license from the plaintiff, cut it down and converted it to their own use, for which cutting this action was brought. Bickford in continued possession of the premises from

the date of his deed till after the cutting of the timber, when the plaintiff entered upon him for condition broken, the residue of the purchase money being still due.

Upon these facts the parties submitted the cause to the decision of the court, the defendants waiving any objection to the form of action.

MELLEN, C. J., delivered the opinion of the court, as follows:

If A. mortgage lands to B. in fee, the legal estate is considered to be in B. as between him and A. and those claiming under A.; but as to all the world but B., A. is considered as seised of the legal estate, and so may convey to C., subject, however, to the mortgage (*Blaney v. Bearce*, ante, p. 132). For this reason, B. may maintain trespass against A. and those claiming under him, because A.'s possession is in submission to B.'s title, and is, in fact, the possession of B. In *Newall v. Wright*, 3 Mass. 138, Parsons, C. J., delivering the opinion of the court, says, "It is very clear that, when a man seised of lands in fee shall mortgage them, if there be no agreement that the mortgagor shall retain the possession, the mortgagee may enter immediately, put the mortgagor out of possession, and receive the profits; and if the mortgagor refuses to quit the possession, the mortgagee may consider him as a trespasser, and may maintain an action of trespass against him, or he may, in a writ of entry, recover against him as a disseisor." There is nothing, then, in the relation between mortgagor and mortgagee, inconsistent with the nature of an action of trespass by the latter against the former; and surely a mortgagor, or one claiming under him, is not less liable for an injury to the mortgagee by cutting down and carrying away timber and wood from the premises, than he would be by merely withholding the possession and receiving the rents and profits to his own use (*Union Bank v. Emerson*, 15 Mass. 159; Bro. Tr. 55, 362; 5 Rep. 13; Cro. Eliz. 784). We need not, however, rely on these cases, or decide on the form of action, as the parties have waived all objections to form, if any exist. But on these principles we decided the case of *Smith v. Goodwin*, cited for the plaintiff; and, on the same principles, we think the action maintainable, unless the alleged usage and general understanding with respect to felling trees and clearing wild lands, though mortgaged to secure payment of the purchase money, should be considered as preventing the application of those principles to a case like the present. It was urged by the defendant's counsel that such usage and general tacit understanding are equal

to a license from the mortgagee to the mortgagor or his assignee, to do the acts which are charged in this action as a trespass. The facts in the case do not present this question. We have no means of knowing whether any such usage and general understanding exist. The argument of the counsel, therefore, cannot avail, as it does not apply. If such usage and understanding existed at the time of the transactions of which we have been speaking, and were considered as amounting to a license, and pleadable as such against the deed in question, they should have been disclosed in the form of a special plea, and the question arising thereon left to the decision of the jury. As the case stands, the plaintiff must have judgment for the value of the timber and costs, according to the agreement of the parties.¹

COOPER v. DAVIS

SUPREME COURT OF ERRORS OF CONNECTICUT, 1843

(15 Conn. 556)

THIS was an action of trover to recover the value of a pair of Burr mill-stones, taken by the defendant.

The cause was tried at New-Haven, January term, 1843, before Waite, J.

The plaintiff claimed title to the property in question, by virtue of a sale made to him by Walter S. Thompson and Charles Cooper. The defendant, who admitted the taking, claimed a right to do so, under the following circumstances. In October, 1839, he was the owner of an old grist-mill, and, having purchased a tract of land for the site of a new grist-mill, he entered into a written contract with Thompson, Cooper and David O. Way, to build and complete the new mill. After they had erected the building for the new mill, and before it was completed according to the contract, viz., on the 21st of February, 1840, the defendant sold and conveyed to them the whole property owned by him, belonging to the old mill and the new one, including the mill-stones in question. To secure the balance of the purchase-money unpaid at the time of the sale, they afterwards, on the same day, gave two promissory notes, and executed and delivered to the defendant a mortgage deed of the same property. At this time said mill-stones had been taken from

¹ *Pettengill v. Evans*, 5 N. H. 54 (1829); *Dorr v. Dudderar*, 88 Ill. 107 (1878), accord. So in Vermont, after condition broken: *Langdon v. Paul*, 22 Vt. 205 (1850); *Hagar v. Brainerd*, 44 Vt. 294 (1872).

the old mill and placed by the side of the new one, to be used for its completion. They soon afterwards finished it, and put it in operation for grinding corn and other grain, using said mill-stones for this purpose. The lower stone was set in a frame, fastened to the floor of the mill, and was fastened therein by means of wedges driven between the stone and frame; and in all other respects the stones were placed in the mill in the manner in which mill-stones are usually placed in grist-mills.

Cooper and Way having failed to pay one of their notes after it became due, the defendant brought his bill for a foreclosure, and, at the term of the Superior Court in January, 1842, obtained a decree against them, limiting the time of redemption to the first Monday of July, 1842. At the same term the defendant recovered judgment against them in an action of ejectment for the mortgaged premises. He afterwards took out execution on this judgment, and placed it in the hands of an officer to be executed. The officer made demand of Thompson and Cooper for the possession of the premises, who informed him that he lived upon them, and requested a delay of one week that he might remove his family therefrom; to which the officer consented. In the meantime Thompson and Cooper repaired to the mill and removed therefrom the mill-stones, and sold them to the plaintiff, who carried them to a certain shed and placed them there for safe-keeping. The defendant afterwards found them in the shed, took them away and converted them to his own use; which is the taking complained of in the declaration. Cooper and Way, the mortgagors, continued in possession of the mill from the time of the sale made to them until after the removal of the mill-stones.

Upon these facts the plaintiff claimed that he was entitled to a verdict in his favour; that the mill-stones were not conveyed to the defendant by virtue of the mortgage deed and, consequently, that he never had any interest in them; that the mortgagors, having placed them in the mill for the purpose of carrying on their business, might lawfully remove them at any time while they continued in possession; that having so removed them they might legally sell and deliver them to the plaintiff, and the plaintiff prayed the court so to instruct the jury.

The court did not so instruct them, but informed them that although the mill-stones were not conveyed to the plaintiff by virtue of the mortgage deed, yet, having been placed in the mill in the manner stated, they became annexed to the freehold, and the mortgagors had no right to remove them therefrom and convey

them to the plaintiff, especially after a decree of foreclosure, and judgment in an action of ejectment against them.

The jury returned a verdict in favour of the defendant, and the plaintiff moved for a new trial for a misdirection.

WAITE, J. The defendant claimed title to the mill-stones in question, by virtue of a mortgage made to him of certain real estate, upon which was situated a grist-mill. He had obtained against the mortgagors a decree for a foreclosure, and a judgment for the possession, in an action of ejectment. But before the expiration of the time limited for the foreclosure, and before he had taken actual possession, the mortgagors severed the stones from the mill and sold them to the plaintiff. The defendant, having afterwards found them, took possession of them as his own property.

The question arising upon these facts was whether the plaintiff had thus acquired, as against the defendant, a valid title. Upon the trial in the court below it was supposed that, after a decree for a foreclosure had been passed, and a judgment rendered in an action of ejectment for the possession, the mortgagors might be considered as trespassers in removing the fixed machinery and disposing of it in the manner stated in the motion.

The law recognized in the case of *Hodgson v. Gascoigne* was thought to be applicable to the present (5 B. & Ald. 81; 7 E. C. L. 35). It was there holden that after a landlord had recovered judgment against his tenant in an action of ejectment for the possession of the demised property, the tenant ceased to have any interest in the growing crops, and the sheriff had no right to levy an execution upon them.

But, upon consideration, we are all satisfied that the principle laid down in that case does not apply to the present. There, the question was as to the relative rights of a landlord and tenant; here, as to the rights of a mortgagor and mortgagee.

By repeated decisions it is now fully established that a mortgagor, before his right of redemption is foreclosed, continues the owner of the real estate mortgaged; that he is not accountable for the rents and profits, nor liable, in an action at law, for waste committed while in possession. The mortgagee has merely a lien upon the property for the security of his debt, by virtue of which he may obtain possession, and appropriate the pledge in payment of his debt.

The mortgagor has, indeed, no right by the commission of

waste to render the security inadequate. But the appropriate remedy for such conduct is by way of injunction. If the security is impaired by cutting and carrying away the wood and timber, the mortgagee has no power to seize them after they have been severed and carried away; but his duty, in such case, is to restrain the mortgagor from such acts by an injunction.

These general principles are not denied. But it is claimed that the rights of the defendant have been varied by the judgment in his favour for the possession. But we do not see that that circumstance can make any material difference. He had not taken actual possession; nor had his title to the property become absolute by the decree. He stood, simply, in the character of mortgagee out of possession. His further proceedings in relation to the mortgage might at any time have been arrested by paying him his debt. His interest in the property continued to be but a lien. The mortgagors continued in possession, and as such were the owners. The mill-stones, after they had been severed from the mill, removed and sold, could not be reclaimed by the defendant by virtue of his mortgage. And although the design of the mortgagors probably was to impair the defendant's security, and prevent him from collecting the full amount of his debt, yet we cannot say that he is entitled to relief in the manner in which he has sought it. His duty was to have protected his rights by an application for an injunction.

Upon this ground, therefore, without advertng to the other questions, which we do not consider it necessary to examine, we think a new trial must be granted.

In this opinion the other Judges concurred.

*New trial to be granted.*¹

¹ *Kircher v. Schalk*, 39 N. J. L. 335 (1877); *Clark v. Reyburn*, 1 Kans. 281 (1863); *Vanderslice v. Knapp*, 20 Kans. 647 (1878); *Tomlinson v. Thompson*, 27 Kans. 70 (1882);

Triplett v. Parmlee, 16 Neb. 649 (1884); *Verner v. Betz*, 46 N. J. Eq. 256 (1889), *accord*. Compare *Buckout v. Swift*, 27 Cal. 433 (1865), and *Hill v. Gwin*, 51 Cal. 47 (1875).

VAN PELT *v.* MCGRAW

COURT OF APPEALS OF NEW YORK, 1850

(4 N. Y. 110)

VAN PELT sued Southworth and McGraw in the Court of Common Pleas of Tompkins County, and declared in case for wrongfully and fraudulently removing rails, timber, &c., from certain lands on which the plaintiff held a mortgage, thereby injuring his security, &c. It was proved on the trial that in May, 1840, Almeron Baily and William E. Baily, being the owners of 119 acres of land in Dryden, Tompkins County, executed a bond and mortgage covering the same to Harvey A. Rice, to secure the payment of \$500, one half payable in May, 1841, and one half in May, 1842. In August, 1842, Rice sold and assigned the bond and mortgage to the plaintiff, who instituted a foreclosure suit thereon, and obtained the usual decree for the sale of the premises in August, 1844. The amount then due on the mortgage, including the costs of the foreclosure suit, was nearly nine hundred dollars. The mortgagors were insolvent, and the premises were an inadequate security for this sum. On the sale under the decree, which took place in October, 1844, the premises produced only the sum of \$575. Shortly before the sale and while the advertisement was running, the defendant McGraw, who had become the owner of the equity of redemption by conveyance from the mortgagors, avowing that he would "strip the land," proceeded to draw off rails, and to cut down and draw off valuable timber, &c. The premises were thereby considerably lessened in value. These acts were done by McGraw, and by Southworth aiding and assisting him, with full knowledge of the plaintiff's mortgage, and of the insolvency of the mortgagors.

The defendants' counsel requested the court to charge the jury that McGraw, having the fee of the land and being in possession, had a right to take off the fences and timber, and that these acts, being lawful, could not be deemed to have been done wrongfully or fraudulently. The court charged that the acts were lawful if they did not prejudice the plaintiff's rights or impair his security, but if the defendants had impaired that security with a knowledge of the lien, then their acts were wrongful and fraudulent. The defendants' counsel also requested the court to charge that, inasmuch as the plaintiff had alleged in his declaration that the defendants did the acts fraudulently and with a design to injure

the plaintiff, he was bound to prove those allegations by other evidence than the mere removal of the rails and timber for their own emolument. The court refused so to charge. To the charge as delivered and to the refusal to charge as requested, the defendants excepted. The jury found a verdict of \$150 in favor of the plaintiff. The judgment entered thereon was affirmed in the Supreme Court on error brought. The defendants appealed to this court.

PRATT, J. There is no doubt but that an action on the case will lie for an injury of the character complained of in this case. It forms no objection to this action that the circumstances of the case are novel, and that no case precisely similar in all respects has previously arisen. The action is based upon very general principles, and is designed to afford relief in all cases where one man is injured by the wrongful act of another, where no other remedy is provided. This injury may result from some breach of positive law, or some violation of a right or duty growing out of the relations existing between the parties (1 Cow. Treat. 3).

The defendant McGraw, in this case, came into the possession of the land subject to the mortgage. The rights of the holder of the mortgage were therefore paramount to his rights, and any attempt on his part to impair the mortgage as a security was a violation of the plaintiff's rights. But the case is not new in its circumstances. The case of *Gates v. Joice*, 11 John. 136, was precisely like the case at bar in principle. That action was brought by the assignee of a judgment against a person for taking down and removing a building from the land upon which the judgment was a lien. The plaintiff's security was thereby impaired. The court in that case sustained the action. The decision in that case was referred to and approved in *Lane v. Hitchcock*, 14 John. 213, and in *Gardner v. Heartt*, 3 Denio, 234. Nor is there anything in the case of *Peterson v. Clark*, 15 John. 205, which conflicts with the principle of these cases. That was an action by a mortgagee in the usual form of an action for waste. The declaration alleged seisin in the plaintiff, upon which the defendant took issue. There was no allegation that the mortgagor was insolvent, or the judgment as a security impaired. The only issue to be passed upon was that in relation to the seisin. It is quite clear that upon such an issue the mortgagee must fail. Now this action is not based upon the assumption that the plaintiff's land has been injured, but that his mortgage as a security has been impaired. His damages, there-

fore, would be limited to the amount of injury to the mortgage, however great the injury to the land might be. It could, therefore, be of no consequence whether the injury occurred before or after forfeiture of the mortgage. The action is clearly maintainable.

It only remains, therefore, to be considered whether there was any error in the charge of the court. In order to come to a correct conclusion upon this point, it becomes necessary to examine the exceptions to the charge in connection with the undisputed testimony in the cause, and the propositions upon which the court were required to charge. It had been proved that the defendants knew of the mortgage, that the mortgagors were insolvent, and that the property had been advertised for sale by virtue of the mortgage. They were forbidden to remove the fences and timber, for the reason that the security would thereby be impaired. It was also proved that the value of the mortgage had been impaired by such removal. Under this state of facts the defendants' counsel asked the court to charge the jury that McGraw, having the fee of the land and being in possession, had a right to take off the fences and timber; that the acts being lawful could not be deemed to have been done wrongfully or fraudulently. The court charged that the acts were lawful if they did not prejudice the plaintiff's rights or impair his security, but that if they had impaired the security, knowing the plaintiff's lien, they were liable. As an answer to the propositions of the defendants' counsel, the charge was correct. Acts may be harmless in themselves, so long as they injure no one, but the consequences of acts often give character to the acts themselves. It is upon this distinction that the maxim is based, *sic utere tuo ut alienum non ledas*. As I have before observed, the lien of the plaintiff upon the land was paramount to any interest which the defendants possessed therein, and any wilful injury of that lien by them was a violation of the plaintiff's rights, for which an action would lie.

The defendants' counsel also asked the court to charge that, the plaintiff having alleged in his declaration that the defendants did the acts fraudulently and with a design to injure the plaintiff, he was bound to prove the allegations by evidence other than the mere act of removing the timber for the emolument of the defendants. The court refused so to charge, to which there was an exception. This proposition is somewhat obscure, but I understand it to mean that the plaintiff should prove that the primary motive of the defendants was to cheat the plaintiff. If the defendants knew that by taking off the timber the value of the plaintiff's

mortgage as a security would be impaired, they would be legally chargeable with a design to effect that object, although their leading motive may have been their own gain. A man must be deemed to design the necessary consequences of his acts. If, therefore, he does a wrongful act, knowing that his neighbor will be thereby injured, he is liable. It is upon this principle that persons are often chargeable with the intent to defraud creditors, or to commit any other fraud. The immediate motive is oftentimes self-interest, but if the necessary consequence is a fraud upon his neighbor, the actor is legally chargeable with a design to effect that result. Upon the whole, therefore, although the charge is not quite so explicit as it should be, yet taken in connection with the propositions presented to the court, I think it was substantially correct. The judgment of the Supreme Court should be affirmed.

*Judgment affirmed.*¹

WILSON *v.* MALTBY

COURT OF APPEALS OF NEW YORK, 1874

(59 N. Y. 126)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, affirming an order of Special Term denying a motion for a new trial.

This action was brought for the foreclosure of a mortgage made by the defendant, George Hubbard, and wife. Plaintiff sought to recover of defendants, C. S. Maltby and Thorn J. Houston, in case the mortgaged premises should not realize, upon sale, sufficient to pay the mortgage debt, the value of certain wood cut upon the mortgaged premises, the complaint alleging fraud and collusion between them and the mortgagor.

Hubbard purchased the premises in question, being mostly woodland, of plaintiff's intestate, in 1867, subject to a mortgage thereon held by one Knapp, giving the mortgage in suit for part of the purchase-money. In 1871 Hubbard entered into a contract with Maltby and Houston, by which he sold to them the wood growing on the mortgaged premises, the same to be cut by the purchaser, measured and paid for March 1, 1871. Plaintiff, learning that the

¹ *Waterman v. Matteson*, 4 R. I. 539 (1857); *Jackson v. Turrell*, 39 N. J. L. 329 (1877), accord. *Adams v. Corrison*, 7 Minn. 456 (1862), contra. Compare *Allison v. McCune*, 15 Oh. Rep. 726 (1846).

wood was being cut, called upon Hubbard and threatened to stay the cutting by injunction; but, upon Hubbard agreeing to pay over the money received for the wood on the Knapp mortgage, he abandoned the intent. On the 27th February, 1871, after the wood was all cut, plaintiff, being apprehensive that Hubbard would not do as he agreed, notified the purchasers of the wood of his lien, of the agreement with Hubbard, and communicated to them his fears, requesting them to delay paying over the purchase-money; this they declined to do, but paid the same to Hubbard, as agreed, on the first of March. Up to the time of such notice they had no knowledge that there was any mortgage upon the premises, and the allegations of fraud were not proved. Hubbard did not pay it over, as agreed, but absconded therewith. The mortgaged premises were insufficient to pay the mortgages.

ANDREWS, J. The contract for the purchase of the wood was made by the defendants, Maltby and Houston, with Hubbard, the owner of the land from which it was taken. Hubbard was in possession of the premises, and, by the contract, the defendants were to cut the wood and to pay Hubbard a certain price per cord on the 1st of March, 1871. The defendants did not know until on or about the 24th of February, 1871, of the plaintiff's mortgage, or that there was any incumbrance on the land. The wood had then been cut, and nothing remained to be done by the defendants under the contract, except the payment of the purchase-price. There can be no doubt that the title to the wood vested in the defendants upon its severance from the land. They were the owners of the wood by purchase from the owner of the land, and were debtors to Hubbard for the agreed price. The fact that the land was mortgaged when the contract was made, or when the wood was cut, did not affect the defendants' title to the severed property, and although the cutting of the wood impaired the security of the mortgage, the defendants were not responsible to the mortgagees for the resulting injury, unless they cut the wood knowing of the lien and with intent to injure the plaintiff in respect to his security (*Van Pelt v. McGraw*, 4 Comst. 110). There is an additional reason in this case why the plaintiff is precluded from treating the act of the defendants, in cutting the wood, as tortious, or as a violation of his rights or equities. After he was informed that the defendants were cutting the wood, he took no proceeding to prevent a continuance of the waste, but allowed the work to proceed upon the promise of Hubbard that he would apply the money

he should receive from the defendants upon the Knapp mortgage. The promise was made in December, and it was not until the following February that he notified the defendants of his claim on the premises, and at that time they had completed the work under the contract with Hubbard. This transaction operated as a license to Hubbard to sell the wood to the defendants, and estopped the plaintiff from questioning their title. The question then comes to this: Could the defendants lawfully pay their debt to Hubbard, against the protest of the plaintiff, after being informed that Hubbard threatened to violate his agreement to apply the money on the prior mortgage? There can be but one answer to this question: The defendants' contract was with Hubbard alone, and their debt was owing to him. The promise of Hubbard to apply the amount he should receive from the defendants on the Knapp mortgage did not make the plaintiff the assignee of the debt. It gave to the plaintiff at most a right as against Hubbard to intercept the payment upon proceedings taken, based upon evidence that he threatened to dispose of the money in violation of his agreement.

We express no opinion whether such an action could be maintained, but we think it is clear that, until prevented by the order of the court, the defendants could lawfully pay the debt to Hubbard, and that, if they had refused, he could have maintained an action to recover it. The defendants were neither parties nor privies to the agreement between Hubbard and the plaintiff, as to the application of the fund, and they owed no legal duty to the plaintiff to defer the payment of their debt at his request. That agreement recognized Hubbard's right to receive the payment, and no legal proceedings having been taken to prevent it, the payment to him was a valid discharge of their obligation. In view of the finding of the jury, it cannot be claimed that they colluded with Hubbard in the transaction, or misled the plaintiff, or induced him to institute legal proceedings against Hubbard upon the promise to retain the money until an injunction should be procured.

The judgment should be affirmed.

All concur.

*Judgment affirmed.*¹

¹ *Augier v. Agnew*, 98 Pa. St. 587 (1881), *accord*.

SEARLE v. SAWYER

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1879

(127 Mass. 491)

MORTON, J. This is an action of tort for the conversion of a quantity of wood and timber.

It appeared at the trial that one Warren, being the owner of a lot of wood-land, mortgaged it to the plaintiff's testator; and that, after the condition of the mortgage was broken, but before the mortgagee had taken possession, Warren cut the wood and timber in question and sold it to the defendant. The presiding justice of the Superior Court ruled that, "if the defendant bought of the mortgagor wood and timber cut from the mortgaged premises, and exercised such acts of ownership over the same as would amount to a conversion, then he would be liable to the mortgagee for the value of the same, without any previous demand, and although he bought the same in good faith and without any notice or knowledge of any claim upon the same." To this ruling the defendant excepted.

Upon the question whether, if a mortgagor commits waste by removing buildings, wood, timber, fixtures or other parts of the realty, the mortgagee out of possession can follow the property after it has been severed, and recover it or its value, there have been conflicting decisions in different jurisdictions. In New York and Connecticut, it has been held that a mortgagee out of possession cannot maintain an action at law for waste committed by the mortgagor; and that he has no property in wood or timber cut and removed, so as to enable him to maintain trover for its conversion (*Peterson v. Clark*, 15 Johns. 205; *Cooper v. Davis*, 15 Conn. 556). On the other hand, it has been held in Maine, New Hampshire, Vermont and Rhode Island, that timber, if wrongfully cut and removed by the mortgagor, remains the property of the mortgagee out of possession, and he may recover its value of the mortgagor or a purchaser from him (*Gore v. Jenness*, 19 Maine, 53; *Frothingham v. McKusick*, 24 Maine, 403; *Smith v. Moore*, 11 N. H. 55; *Langdon v. Paul*, 22 Vt. 205; *Waterman v. Matteson*, 4 R. I. 539).

We are not aware that this precise question has been adjudicated in this State, but the previous decisions of this court in regard to the rights of mortgagees and the nature of their interests in the mortgaged estate, are such as to lead to the conclusion that a mort-

gagee out of possession is entitled to timber, fixtures and other parts of the realty wrongfully severed, and may recover them, or their value, if a conversion is proved. In *Fay v. Brewer*, 3 Pick. 203, it was held that a mortgagee in possession, but before foreclosure, could maintain an action on the case in the nature of waste against a tenant for life, for cutting down trees on the mortgaged land before he took possession, and the court in the opinion comment on the case of *Peterson v. Clark*, 15 Johns. 205, as not being of authority here, "since the law of mortgage in New York is so different from our own." In *Page v. Robinson*, 10 Cush. 99, it was held that a mortgagee, after condition broken, though not in actual possession, could maintain trespass against the mortgagor, or one acting under his authority, for cutting and carrying away timber-trees from the mortgaged premises, without license express or implied from the mortgagee. In *Cole v. Stewart*, 11 Cush. 181, it was held that an action at law would lie by a mortgagee not in possession against one who, under authority from the mortgagor, removed a building from the mortgaged land. In *Buller v. Page*, 7 Met. 40, a second mortgagee sold to the defendant a building standing on the mortgaged land, who took it down and removed the materials. It was held that the administrator of the mortgagor could not maintain trover for the materials, as the fee of the mortgaged premises was in the mortgagees, and the removal of the building vested no property in the materials in the mortgagor's representative.

In *Wilmarth v. Bancroft*, 10 Allen, 348, a house standing on mortgaged land was partially destroyed by fire. The mortgagor sold to the defendant such materials as were saved, and brought this action to recover the price agreed to be paid. It was held that the fact that the mortgagee had claimed the agreed price, and forbidden the defendant to pay it to the mortgagor, was a good defence. The opinion is put upon the ground that the partial burning of the house, and the consequent severance of the unburnt materials, "did not terminate or affect the mortgagee's interest in the fixtures." So it has been held in several cases that a mortgagee out of possession may maintain an action at law against the mortgagor or a stranger for removing fixtures and thus impairing the security (*Gooding v. Shea*, 103 Mass. 360; *Byrom v. Chapin*, 113 Mass. 308; *King v. Bangs*, 120 Mass. 514).

The fair result of these authorities is that, under our law, a mortgagee is so far the owner in fee of the mortgaged estate that, if any part of it is wrongfully severed and converted into personalty

by the mortgagor, his interest is not divested, but he remains the owner of the personalty, and may follow it and recover it or its value of any one who has converted it to his own use (*Stanley v. Gaylord*, 1 Cush. 536; *Riley v. Boston Water Power Co.*, 11 Cush. 11). But the severance must be wrongful, and, where it is made by the mortgagor or one acting under his authority, whether it is wrongful or not will depend upon the question whether a license to do the act has been expressly given, or is fairly to be implied from the relations of the parties. The true rule is as stated in *Smith v. Moore*, 11 N. H. 55, and approved in *Page v. Robinson*, 10 Cush. 99, that acts of the mortgagor in cutting wood and timber, or otherwise severing parts of the realty, are not wrongful when from the circumstances of the case the assent of the mortgagee may be reasonably presumed. The relation between a mortgagor and mortgagee is a very peculiar one. The mortgagee takes an estate in fee, but the sole purpose of the mortgage is to secure his debt. Usually in this State the mortgage contains a provision that the mortgagor may retain possession until condition broken. The object of this is that the mortgagor may have the use and enjoyment of his property, and it implies a license to use it in the same manner as such property is ordinarily used and as will not unreasonably impair the adequacy of the security. If a mortgage be of a dwelling-house, the mortgagor may do many acts, such as acts of repair or alteration, which may involve the removal of parts of the realty, which would not be wrongful because within the license implied from the relations of the parties. If a farmer mortgages the whole or a part of his farm, with a clause permitting him to retain possession, as was probably the case at bar, it is within the contemplation of the parties that he is to carry on his farm in the usual manner, and a license to do so is implied. In such case, it is clear that he is entitled to take the annual crops, and wood for fuel (*Woodward v. Pickett*, 8 Gray, 617). And we do not think that the implied license is necessarily limited to the annual crops, but that it extends to any acts of carrying on the farm which are usual and proper in the course of good husbandry. If, in carrying on similar farms, it is usual and is good husbandry to cut and carry to market wood and timber to a limited extent, a license to do this might be implied from the relation of the parties.

The bill of exceptions furnishes us with so meagre and imperfect a history of the case, that we are unable to say how far these considerations are applicable in the case at bar. But the ruling of the

presiding justice seems to have been general, that the defendant would be liable if the wood and timber were cut from the mortgaged premises, and to have excluded the question whether, under the circumstances of the case, the assent of the mortgagee thereto could fairly be presumed by the jury. We are of opinion that this question should be submitted to the jury, and, therefore, that a new trial must be ordered.

Exceptions sustained.

CHAPTER II

EQUITY RELATIONS

SECTION I.—ONCE A MORTGAGE, ALWAYS A MORTGAGE

HOWARD *v.* HARRIS

HIGH COURT OF CHANCERY, 1681

(1 *Vern.* 33)

Howard mortgages land, and the proviso for redemption was thus: provided that I myself, or the heirs males of my body may redeem.¹ The question was, whether his assignee should redeem it? and it was decreed he should; for if once a mortgage, always a mortgage.²

In this case part of the mortgaged estate happened to be in Mrs. Howard's jointure, and it was admitted that she thereby was entitled to a redemption of the whole mortgage; and so it was adjudged in the case of Browne and Edwards.³

BATTY *v.* SNOOK

SUPREME COURT OF MICHIGAN, 1858

(5 *Mich.* 231)

APPEAL from Macomb Circuit in Chancery.⁴

MANNING, J.: The bill in this case is very inartificially drawn; so much so that, on first reading it over, one is at a loss to know

¹ The words of the proviso are "that if he or the heirs of his body paid the £565, the mortgage money, and interest at two years' end, the conveyance to be void." Then a further sum of money was borrowed by Howard; and the above-mentioned proviso was released by deed, and another proviso contained in such last-mentioned deed "that if he or the heirs of his body begotten should, at a given day therein mentioned, pay £1,000, then," &c. And in this case there was a covenant on the

part of the mortgagor that no person should have the power or benefit of redemption, but only himself and the heirs of his body. On the effect of such a covenant, *vide Newcomb v. Bonham*, *ante*, p. 7, note. In the principal case a plea as to the redemption was put in, but overruled.—*Rep.*

² *Cf. Newcomb v. Bonham*, 1 *Vern.* 7, 214, 232 (1681, 1683, 1684).

³ *Reg. Lib.* 1681, A. fol. 260.

⁴ The facts are sufficiently stated in the opinion.

whether it is for the redemption of mortgaged premises, for the specific performance of a contract, or to set aside certain transactions for fraud. We mention this, as the merits of a case may sometimes be overlooked or lost sight of by reason of the rubbish under which it is concealed. We think, however, there are sufficient facts stated, when separated from the irrelevant or immaterial matter, to enable us to treat it as a bill to have a certain deed and contract relative to real estate declared a mortgage, and for redemption of the mortgaged premises. As such we shall consider it.

Complainant purchased of the defendant, Warner, in 1853 a lot in the village of Mt. Clemens, on which there was a saw mill. On the 5th of April, 1854, the premises were deeded by Warner to complainant, who at the same time, to secure a part of the purchase-money, mortgaged the lot to Warner for \$2331.26, payable with interest—\$500 on the 18th November, 1854; \$500 in one year thereafter; the like sum in two years; and the balance, being \$831.26, in three years. The complainant soon thereafter, and in less than a year, became embarrassed in his business, and was unable to pay Warner and his other creditors what he was owing them. He was indebted to Warner in a large sum over and above the mortgage debt, and Warner, being aware of his pecuniary difficulties, was solicitous to get his debt secured—that is, that portion of it not included in the mortgage; and went twice from Saginaw, where he was residing, to Mt. Clemens, to see if he could not make some arrangement with complainant for that purpose. On his last visit a settlement took place between the parties, from which it appears complainant turned out property in part payment of what he was owing him, leaving a balance still due Warner of \$2000. Warner, to effect the settlement, was induced to take the property at more than its value. In pursuance of this settlement, the mortgage from complainant to Warner was cancelled, and the mortgaged premises were deeded back to Warner by complainant. This deed bears date on the 6th February, 1855.

There is also a contract between the parties for the repurchase of the premises by complainant. This contract bears date February 7th—the day after the deed. Were the two instruments parts of one and the same transaction, or were they separate and distinct transactions? The difference in their dates favors the latter view, but it is by no means conclusive. The bill alleges both had their origin in the settlement, and that they are parts

of the same transaction, and were intended as security for the payment of the \$2000. The answer, instead of denying this in clear and explicit terms, as it should have done if it was not the truth, we think admits it. Referring to Warner's second visit, the answer says he (Warner) was about to return home when complainant stated to him he had a horse and buggy and a certain promissory note he would let him have if "he would release all complainant was owing him aside from the mortgage and a part of the latter, and extend the payment due on the mortgage to the 1st of December, 1855." The answer then proceeds: "That this defendant, thinking he could do no better, then and there agreed to take said note and horse and buggy and a deed of said saw-mill lot and mill, and entered into contract A" (the contract of 7th February, 1855, already spoken of), "with the design and express understanding on the part of said complainant and this defendant, if he (the said complainant) failed in any particular in complying with said contract A, that he (the said complainant) should have no right at law or in equity to the said lands and saw mill; and said contract A was particularly and expressly conditioned to be the same as an original contract for the conveyance of land, in which time should be material, and every requisite on the part of said complainant to be done and performed should be by him literally complied with."

Here is an admission of complainant's case by the answer. It admits the deed and contract are parts of one transaction, and that the object of them was to secure the balance of complainant's debt to Warner. It also shows that if complainant failed to pay promptly when the debt became due, he was to forfeit all right at law and in equity to the premises he had conveyed to Warner, and that to effect this object it was agreed the contract should be considered and treated as an original contract for the purchase of the premises, in which time should be material. When the arrangement was entered into there was but one payment due on complainant's mortgage of the 5th April, 1854, and one other that would become due before the 1st December, 1855, when complainant was required to pay \$500 on the contract of 7th February, which also provided for the payment of the remaining \$1500 in one year thereafter—nearly a year before the last installment would have fallen due on the mortgage given in 1854. The contract contained a covenant for the payment of the \$2000, and by it complainant was to retain possession of the premises and was not to remove any buildings or machinery.

Other facts might be mentioned to show the mortgage of '54 was canceled, and the deed and contract of the 6th and 7th February, '55, were made to secure the \$2000 complainant was owing Warner; but it is unnecessary to notice them or to go into the proofs to establish what is admitted by the answer.

The only remaining question is, whether the case is one proper for the interposition of a court of equity.

Once a mortgage, always a mortgage, may be regarded as a maxim of the court. Equity is jealous of all contracts between mortgagor and mortgagee by which the equity of redemption is to be shortened or cut off. The mortgagor may release the equity of redemption to the mortgagee for a good and valuable consideration when done voluntarily, and there is no fraud and no undue influence brought to bear upon him for that purpose by the creditor. But it cannot be done by a cotemporaneous or subsequent¹ executory contract by which the equity of redemption is to be forfeited if the mortgage debt is not paid on the day stated in such contract without an abandonment by the court of those equitable principles it has ever acted on in relieving against penalties and forfeitures. What we now call a mortgage was at common law a conditional conveyance of the land, by which the title of the vendee was to terminate or become absolute on the performance or non-performance of the condition of the grant by the vendor at the day. When such conveyance was made to secure a debt, or for the performance of some other act by the vendor, equity took cognizance of the transaction and declared the conveyance a security merely for the payment of the debt or doing of the act, and on the performance thereof by the vendor, after the day had elapsed and the estate had become absolute, would decree a reconveyance of the premises. To allow the equity of redemption to be cut off by a forfeiture of it in a separate contract would be a revival of the common law doctrine, using for that purpose two instruments instead of one to effect the object.

Snook, the other defendant, to whom Warner conveyed on the 22d December, 1855, purchased with full knowledge of complainant's equities. He took possession soon after, and has been in possession ever since.

The decree of the court below, dismissing the complainant's bill with costs, must be reversed and a decree be entered declaring the deed and contract one transaction and to be a mortgage, and that

¹ Compare *Wynkoop v. Cowing*, 21 Ill. 570 (1859).

complainant is entitled to redeem; and the transcript must be remitted to the court below for further proceedings.

The other justices concurred.¹

MOONEY v. BYRNE¹

COURT OF APPEALS OF NEW YORK, 1900

(163 N. Y. 86)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 20, 1897, affirming a judgment in favor of defendants, entered upon a dismissal of the complaint by the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

VANN, J. The case made by the complaint was that of a mortgagor with a right to redeem from a mortgagee or his devisees in possession. The defendants denied that there was any mortgage, alleged an absolute conveyance from the plaintiff to one Owen Byrne, and a subsequent conveyance from the latter to a *bona fide* purchaser. They also pleaded the Statute of Limitations and specified the period of six and ten years as the limit exceeded by the plaintiff in bringing her action.

The facts agreed upon by the parties and admitted by the pleadings are in substance as follows: On the 14th of August, 1878, the plaintiff owned and was in possession of a parcel of land in the city of New York worth \$10,000 and upwards, and at the same time she was indebted to Owen Byrne in the sum of about \$3000, secured by three mortgages on said premises, which were under process of foreclosure. In order to secure the payment of this indebtedness she conveyed the land to said Byrne at his request by a deed dated on the day last named and duly recorded. "The said deed was given as security" and for no other purpose. It contained full covenants, subject to said mortgages, which, as it was declared, "shall not merge in the fee, but shall remain valid and subsisting liens." Said Byrne at the same time gave back a defeasance of even date whereby he agreed to reconvey to the plaintiff upon the payment to him within one year of said indebtedness

¹ Cf. *Pritchard v. Elton*, 38 Conn. 434 (1871); *Austin v. Bradley*, 2 Day (Conn.), 466 (1807).

certain advances which he agreed to make for her benefit and the costs of the foreclosure proceedings. It was stipulated that she should be relieved from personal liability on the bonds and that no judgment for deficiency should "be claimed or entered against her in any action that may be taken upon said bonds or mortgages so long as she and all persons claiming under her shall not dispute or contest the title of the" said Byrne "or his assigns to said mortgaged premises or the amounts due him on said mortgages. . . ." Said instrument also provided "that as to the agreement by the" said Byrne "to reconvey said premises, time is of the essence thereof, and, further, that this instrument shall not be recorded by or on behalf of the" plaintiff, "and that for a violation of this provision this agreement, so far as the same provides for such reconveyance, shall thereupon become utterly null and void." The defeasance was never recorded.

Said Byrne at once took possession of the premises and remained in possession thereof until the 13th of June, 1881, when he conveyed to one Walker by a deed duly recorded, but "said conveyance was made without the consent of the plaintiff, who had no knowledge of it until this action was begun" on the 7th of March, 1895. Said Byrne died on the 11th of January, 1889, leaving a will by which he gave all his property, real and personal, to the defendants. His executor accounted and has been discharged, and the property of the testator has been delivered to the defendants. The plaintiff claimed that the rents and profits of the premises received by Byrne amounted to more than the principal and interest of the debt secured. She alleged in her complaint that if Byrne had conveyed the premises to any one, such conveyance was made without her knowledge or consent. She demanded an accounting as to the amount due from her, and that she might "be at liberty to redeem said mortgaged premises upon payment of whatever may upon such accounting be found due, which this plaintiff hereby offers to pay," and that the defendants be compelled to convey said premises to her. She also demanded alternative and general relief. Said Walker, who still owns the premises, was not made a party to the action. The trial judge dismissed the complaint upon the ground that "the Statute of Limitations is a conclusive defense," and the Appellate Division affirmed, on an opinion rendered in overruling a demurrer to the answer, when the case was in the first department (15 App. Div. 624; 1 *id.* 316).

The facts agreed upon show that there was a mortgage; for a deed, although absolute on its face, when given as security only, is

a mortgage by operation of law (*Horn v. Keteltas*, 46 N. Y. 605; *Meehan v. Forrester*, 52 N. Y. 277; *Odell v. Montross*, 68 N. Y. 499; *Barry v. Hamburg-Bremen Fire Ins. Co.*, 110 N. Y. 1, 5; *Kraemer v. Adelsberger*, 122 N. Y. 467; *Macaulay v. Smith*, 132 N. Y. 524; 15 Am. & Eng. Encyc. 791; 1 R. S. 756, sec. 3; Laws 1896, ch. 547, sec. 269). While there was no covenant to pay the debt, none was needed, for the property was worth much more than the amount of the indebtedness, and the mortgagee could safely confine his remedy to the land (1 R. S. 739). The absence of such a covenant, the conditional release of any claim for deficiency, and the agreement not to record the defeasance, are of no importance in view of the express admission that the deed was given as security. The deed and defeasance were executed at the same time, and as the latter in express terms refers to the former, they must be construed the same as if both were embodied in a single instrument. When read together in the light of the admission that the object was to secure a debt, it is clear that the transaction was not a conditional sale, and that the covenant making time the essence of the contract to reconvey has no more effect than if it occurred in the defeasance clause of an ordinary mortgage. An instrument executed simply as security cannot be turned into a conditional sale by the form of a covenant to reconvey, and even if there was a doubt as to the meaning, the contract would be regarded as a mortgage, so as to avoid a forfeiture, which the law abhors (*Matthews v. Sheehan*, 69 N. Y. 585). As was said by the Supreme Court of the United States: "It is an established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money. That court looks beyond the terms of the instrument to the real transaction, and when it is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties. . . . It is also an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security, the borrower has, in a court of equity, a right to redeem the property upon payment of the loan. This right cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage. This is a doctrine from which a court of equity never deviates" (*Peugh v. Davis*, 96 U. S. 332, 336).

The right to redeem is an essential part of a mortgage, read in by the law if not inserted by the parties. Although many attempts have been made, no form of covenant has yet been devised that will cut off the right of a mortgagor to redeem, even after the law day

has long passed by (*Clark v. Henry*, 2 Cow. 324, 331; Jones on Mortgages, § 1039). Even an express stipulation not to redeem does not prevent redemption, because the right is created by law. For the same reason an express power to sell at private sale after default is of no effect. "If," said Chancellor Kent, "a freehold estate be held by way of mortgage for a debt, then it may be laid down as an invariable rule that the creditor must first obtain a decree for a sale under a bill of foreclosure. There never was an instance in which the creditor, holding land in pledge, was allowed to sell at his own will and pleasure. It would open the door to the most shameful imposition and abuse" (*Hart v. Ten Eyck*, 2 Johns. Ch. 62, 100). The utmost effect claimed for the provision that the defeasance was not to be recorded is that it was a consent to a private sale after default. As was well said by a recent writer: "If the instrument is in its essence a mortgage, the parties cannot by any stipulation, however express and positive, render it anything but a mortgage, or deprive it of the essential attributes belonging to a mortgage in equity. The debtor or mortgagor cannot, in the inception of the instrument, as a part of or collateral to its execution, in any manner deprive himself of his equitable right to come in after a default in paying the money at the stipulated time, and to pay the debt and interest, and thereby to redeem the land from the lien and incumbrance of the mortgage; the equitable right of redemption, after a default, is preserved, remains in full force, and will be protected and enforced by a court of equity, no matter what stipulations the parties may have made in the original transaction purporting to cut off this right" (3 Pomeroy's Eq. Jur., § 1193). So Mr. Thomas says that "it was a bold but necessary decision of equity that a debtor could not, even by the most solemn engagements entered into at the time of the loan, preclude himself from his right to redeem" (Thomas on Mortgages, § 9).

To prevent undue advantage through inadequacy of consideration, either with or without an opportunity to repurchase, the courts are steadfast in holding that a conveyance, whatever its form, if in fact given to secure a debt, is neither an absolute nor a conditional sale, but a mortgage, and that the grantor and grantee have merely the rights and are subject only to the obligations of mortgagor and mortgagee (*Lawrence v. Farmers' L. & T. Co.*, 13 N. Y. 200). In the case before us there was no purchase of the land by Owen Byrne, for the existing relation of debtor and creditor between himself and the plaintiff was not ended, but was continued by a contract intended to secure the old debt, together

with some further advances. He had a lien on, but no estate in, the land (*Thorn v. Sutherland*, 123 N. Y. 236; *Hubbell v. Moulson*, 53 N. Y. 225, 228). She had the right to redeem and he the right to hold the land until she redeemed, or her right of redemption was cut off by the judgment of a court of competent jurisdiction. The continued existence of the debt is the birthmark of a mortgage, and that is involved in the concession that the land was conveyed as security. The passing of the law day did not extinguish her right, for "once a mortgage, always a mortgage" is a maxim so sound and ancient as to be a rule of property. As the deed was a mortgage when given, it did not cease to be a mortgage after the period of redemption had expired. In *Macauley v. Smith*, *supra*, it was held that the surrender of possession by the grantor to the grantee after the debt became due did not prevent the levy of an attachment, issued in behalf of creditors of the former, upon lands conveyed to the latter as security.

The plaintiff, therefore, is a mortgagor, whose right to redeem from the mortgagee in possession has not been cut off nor cut down by any act or omission on her part. As the defendants stand in the shoes of Owen Byrne, with no rights except by way of gift under his will, the case is the same in principle as if he were living and the sole defendant. After the plaintiff had established her right to redeem as to him what answer could be made thereto? Would it be an answer for him to say, "I have conveyed the lands away, and, therefore, you cannot redeem?" While this would be a conclusive answer in behalf of Walker, the present owner of the land, if he had been made a party and the right to redeem had been asserted against him, can Owen Byrne or his devisees say that, by his wrongful act in conveying the land, he deprived the plaintiff of the right to redeem in any form and confined her to an action for the moneys received on the sale, to which the Statute of Limitations would be a bar? Can a mortgagee by his own act, without a judicial sale or the consent of the mortgagor, destroy the right to redeem, which is so carefully guarded by the courts? The mortgagee could not, by selling the mortgaged premises, change the rights of the plaintiff as against himself. As to him, she still has the right to redeem, for by his act, without her knowledge or consent, he could not annul his covenant to reconvey. That covenant is still in force, and the plaintiff may compel its performance, so far as the rights of third parties, acquired under the Recording Act, will permit. As Owen Byrne conveyed to a *bona fide* purchaser, the plaintiff cannot follow the land as such, but she is not

prevented by that wrongful act from any form of redemption now practicable. No act of his could utterly destroy her cause of action to redeem. He might affect its value, but he could not take its life. As a substitute for a decree requiring him to repurchase the land and convey it to her, which might be impossible and would be apt to involve hardship, she may treat the value of the land, measured in money presumed to be in his hands when her right to redeem was established, as land, and enforce the right of redemption accordingly. Unless we virtually sanction his wrongdoing by permitting him to defeat her right of redemption absolutely by his own act, upon showing a right to redeem she must be permitted to make the best redemption possible as against him. Because he has put it out of his power to render to her all she is entitled to, he cannot refuse to make the nearest approach to it that is left. A court of equity, in order to bring about an equitable result, disregards forms and treats money as land and land as money when required to prevent injustice. A mortgagee in possession under a recorded deed, absolute on its face, with an unrecorded defeasance, cannot sell the land and claim that the purchase price is money as against one who has an equitable right to insist that in legal effect it is land. As the plaintiff established a right to redeem, Owen Byrne and his devisees cannot complain if, in working out the relief required by the violation of his covenant, the court does the best it can to right the wrong by treating the money as land. In order to prevent him from making a profit out of his wrong, the law raises the presumption that he now has the full value of the land as a separate fund in his hands, and treating it as land allows the plaintiff to redeem, the same as if it were in fact land. As against the wrongdoer and his estate it will exert all its power to make the plaintiff whole, paying due regard to equities arising through improvements upon the land, so as not to give her more than she is equitably entitled to.

Thus, in *Meehan v. Forrester*, *supra*, the court, through RAPALLO, J., said: "The sale was shown to have been made without the consent of Meehan and in violation of his rights, and it does not appear that the plaintiff ever had notice of it. He was not bound by such a sale. He was entitled to his land on payment of the amount due to Bertine or his representatives. If Bertine, by reason of his own wrongful act, had deprived himself of the ability to restore the land to which the plaintiff is equitably entitled, he or his representatives were bound to account to the plaintiff, at his election, either for the proceeds of sale of the land or its value at

the time when the plaintiff's right to such reparation was established (*Hart v. Ten Eyck*, 2 Johns. Ch. 117; *Peabody v. Tarbell*, 2 Cush. 227, 233; *May v. Le Claire*, 11 Wall. 236, 237)."

In that case, as in this, the only cause of action alleged or proved was the right to redeem; but as the premises had been wrongfully conveyed, the plaintiff, upon establishing such right, was awarded compensation on the basis of value at the time of the trial. Compensation was allowed as an equitable substitute for actual redemption. In other words, the land which should have been conveyed was appraised by the court, and the defendant compelled to restore the amount of the appraisal, as the only method of redemption possible. The form of relief granted was a money judgment, but that was possible only because a right to redeem had been established, for without that right the relief would be limited to the proceeds of the sale (*Baily v. Hornthal*, 154 N. Y. 648, 661). So in the case at bar, the plaintiff established the same right, but the defendant showed that he had placed it beyond his power to reconvey. Thereupon in rebuttal and not as a part of her cause of action, the plaintiff had the right to prove the present value of the land, so as to follow the money presumed to be in the defendant's hands, and redeem that which he had wrongfully substituted for the land, the same as if it were in fact land. Guided by the cardinal principle that the wrongdoer shall make nothing from his wrong, equity so moulds and applies its plastic remedies as to force from him the most complete restitution which his wrongful act will permit (*May v. Le Claire*, 78 U. S. 217; *Van Dusen v. Worrell*, 4 Abb. Ct. App. Dec. 473; *Miller v. McGuckin*, 15 Abb. [N. C.] 204; *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 108; *Enos v. Sutherland*, 11 Mich. 538, 542; *Budd v. Van Orden*, 33 N. J. Eq. 143; s. c., *id.* 564). When he cannot restore the land it will compel him to restore that which stands in his hands for the land, and will not permit him to assert that it is not land when the assertion would be profitable to himself but unjust to the one whom he wronged. He cannot escape by offering to pay what he received on selling the lands, but must pay the value at the time of the trial. He cannot cut off the right of redemption and convert it into a personal liability, for he is still a mortgagee, and subject as such to the mortgagor's rights. The fact that the injured mortgagor need not take the proceeds of the sale, but may insist on the proved value of the land, as well as the pleadings and proofs, show that this is a pure action to redeem, and must be so regarded for all purposes, including the defense of the Statute of Limitations. While the

mortgagor is helpless as against his grantee, she is not helpless as against him.

The defendants insist that as the plaintiff can only recover a money judgment, the cause of action is in the nature of an accounting for money had and received, and hence that the six-year, or at most the ten-year Statute of Limitations is a bar. This is not an action, however, to recover money, but to redeem land from a mortgage, and but for the misconduct of the defendant would have resulted simply in a judgment of redemption, with an accounting for the rents and profits of the land, after payment of the debt by the plaintiff, according to her demand and offer before the commencement of the action. The period of limitation provided by the Code, within which an action to redeem from a mortgage may be maintained, is twenty years after breach of the condition or the non-fulfillment of the covenant therein contained (Code Civ. Pro., § 379). So far as the defendants are concerned, the plaintiff had a right to redeem. She brought her action to redeem and established it by evidence, and was entitled to judgment accordingly; but as that judgment would be ineffectual because the mortgagee had sold the land, equity will simply vary its relief from a judgment of redemption in land to a judgment of redemption in money representing the land. If the plaintiff had not elected to redeem, but to sue for money had and received to her use, the case of *Mills v. Mills*, 115 N. Y. 80, relied upon by the defendants, might be an authority. In that case, however, as was stated by this court, "all the relief asked for in the complaint is an accounting and a judgment for a sum of money, and no other relief was needed or possible upon the facts established. This was in no sense an action to redeem, as there was no mortgage and nothing to redeem." The relief demanded, as appears from the appeal book on file in this court, was simply a judgment "for all moneys received by" the defendant. No claim was made that the two transactions, which were four years apart, constituted a mortgage, or that there was ever a right to redeem. The theory of the action was that the defendant lawfully sold the land and should account for the proceeds, after deducting his own claim. Thus, the court said: "Absolute title to the lands was vested in the defendant, evidently with the intention that he might sell them and reimburse himself, and pay over any surplus to his brother." The fundamental fact that the defendant sold without right was wanting in that case, and hence the principle, which is the basis of our judgment, could not be applied. It is the wrongful conveyance by the mortgagee in

possession, under a deed absolute on its face, that enables a court of equity to hold on to the case after ordinary redemption has been shown to be impossible, and to allow such a redemption against the wrongdoer as will prevent him from gaining by his wrong, and will give the plaintiff her due as nearly as may be.

The judgment appealed from should be reversed and a new trial granted, with costs to abide event.

PARKER, Ch. J., BARTLETT, MARTIN and WERNER, JJ., concur; GRAY, J., not voting; CULLEN, J., not sitting.

*Judgment reversed, etc.*¹

¹ "That the deed under which defendant held the land, although absolute in form, was a mortgage, admits of no doubt. . . . The original character of the transaction was in no manner changed by the renewal of the note for the balance and by accepting a new agreement as to making a deed on payment of the sum to become due, notwithstanding it contained a clause declaring time of payment material and of the essence of the contract,

and in case of failure the 'intervention of equity is forever barred.' The relation of mortgagor and mortgagee still continued."—*Per* SCOTT, J., in *Tennery v. Nicholson*, 87 Ill. 464 (1877). *Accord*, *Clark v. Henry*, 2 Cowen (N. Y.), 324 (1823); *Stover v. Bounds*, 1 Oh. St. 107 (1853); *Bearss v. Ford*, 108 Ill. 16 (1883); *Parmer v. Parmer*, 74 Ala. 285 (1883); *Turpie v. Lowe*, 114 Ind. 37 (1887), and the authorities generally.

CHAPTER II. (*Continued*)

SECTION II.—RELEASE OF THE EQUITY OF REDEMPTION

TRULL *v.* SKINNER

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1835

(17 *Pick.* 213)

SHAW, C. J., delivered the opinion of the court. The plaintiff has brought his bill in equity to redeem certain mortgaged premises therein described, being parcels of real estate situated in Cambridge. He claims title as the purchaser of an equity of redemption at an officer's sale, made pursuant to the statutes providing for the seizure and sale of equities of redemption for satisfying executions. The sale to the plaintiff was made on May 4, 1833, for \$3500 on an execution and judgment recovered by Ezra Trull against Royal Makepeace, in a suit in which the premises had been attached on mesne process the 11th of April, 1832. The question therefore is, whether Makepeace had such an equity of redemption, liable to be taken by creditors, either in May, 1833, when it was taken in execution, or in April, 1832, when it was attached.

There is no doubt that the transaction of September, 1827, constituted a mortgage. Makepeace conveyed to Skinner & Hurd an estate in fee, consisting of sundry parcels of land; and at the same time an indenture, bearing the same date, was entered into by the parties, reciting the conveyance, reciting that a debt was due from Makepeace to Skinner & Hurd, and containing an agreement that Skinner & Hurd should purchase in the equity of redemption, then about to be sold on execution, should pay off a mortgage due to Dr. Shattuck, should advance further sums of money, and, upon repayment of the sums due to them, should release and reassign to Makepeace. It was further agreed that Makepeace might make sales of the lands from time to time, that Skinner & Hurd would execute releases pursuant to such sales, that they should receive the money, the proceeds of such sales, and apply it to the payment of the debt, and should account for the surplus; and the whole was to be accomplished in three years.

Some small sales were made pursuant to this agreement, and in April, 1831, a large part of the debt remaining unpaid, a new arrangement was made, also by indenture. The instrument of defeasance, before held by Makepeace, was surrendered and delivered up to be cancelled, and new stipulations were entered into, by which Skinner & Hurd leased the land to Makepeace for two years, at a rent about equal to the interest on the debt; and they further stipulated that, upon the payment of a certain sum by Makepeace in two years, they would convey the estate to him.

The first question is whether this last agreement, surrendering and cancelling the instrument of defeasance, was an extinguishment of the equity of redemption, as between the parties, and against the creditors of the mortgager. The court are of opinion that where an absolute deed is given, accompanied by a simultaneous instrument operating by way of defeasance, and afterwards the parties, by fair mutual stipulations, agree that the defeasance shall be surrendered and cancelled, with an intent to vest the estate unconditionally in the grantee by force of the first deed, by such surrender and cancellation the estate becomes absolute in the mortgagee. The original conveyance stands unaffected in form and legal effect; it conveys an estate in fee; the only party who could even claim a right to deny it that operation, by engrafting a condition upon it, has voluntarily surrendered the only legal evidence by which that claim could be supported, and is thereby estopped from setting it up. Such cancellation does not operate by way of transfer, nor, strictly speaking, by way of release working upon the estate, but rather as an estoppel arising from the voluntary surrender of the legal evidence, by which alone the claim could be supported: like the cancellation of an unregistered deed and a conveyance by the first grantor to a third person without notice. The cancellation reconveys no interest to the grantor, and yet taken together such cancellation and conveyance to a third person make a good title to the latter by operation of law. It gives a seisin *de facto*, a conveyance by deed duly registered being to many purposes equivalent to livery of seisin (*Higbee v. Rice*, 5 Mass. R. 352). It is good against the grantor and his heirs by force of the second deed, and it is good against the first grantee and all claiming under him, by force of the registry acts (*Commonwealth v. Dudley*, 10 Mass. R. 403). But the point now decided, of the effect of cancelling an instrument of defeasance, seems to be settled by authorities (*Harrison v. Phillips Academy*, 12 Mass. R. 456; *Rice v. Rice*, 4 Pick. 349). But this rule is to be taken with this qualification,

that the transaction is conducted with perfect fairness and good faith, both as between the parties and as against the creditors of the mortgagor, and that the rights of third persons had not intervened before the completion of the transfer by the cancellation. But if these qualifications do exist, if no unfair advantage is taken of the mortgagor, if by mutual agreement all beneficial and available interest of the mortgagor is taken away, in a form which must forever prevent him from enforcing a right to redeem by any legal or equitable proceeding, there seems to be no interest which the creditor of such party can take for the satisfaction of his claims.

2. The court are also of opinion that the agreement by Skinner & Hurd to convey upon certain terms in two years, contained in the indenture of April, 1831, did not operate as a defeasance, so as to constitute with the original conveyance a new mortgage, because it was not executed at the same time with the conveyance of which it is claimed to be a defeasance, nor as part of one and the same transaction, nor was so understood or intended by the parties (*Kelleran v. Brown*, 4 Mass. R. 443; *Harrison v. Phillips Academy*, 12 Mass. R. 456).

Perhaps where parties by mutual agreement, intending to enlarge and extend the time of redemption, should take up an existing instrument of defeasance and at the same time execute another, connected with the former by proper recitals and provisions, showing an intention to continue the former right of redemption on foot, in a modified form, by force of this substituted instrument of defeasance, such new instrument might be so construed as to relate back to the first deed and preserve the mortgage, when such construction would but support and carry into effect the intent of the parties; of this, however, it is unnecessary to express an opinion. The instrument now relied on as a defeasance was not only not made at the same time the original deed was executed, nor at the time it took effect, nor was it either actually or constructively part of the same transaction, nor was it a case where the parties recognized it as a mortgage, or intended to construe or carry it into effect as such. The court, are therefore, of opinion that by the surrender of the defeasance the right in equity was extinguished, the original mortgagee remained seized by force of the first deed, and the new contract did not constitute a new mortgage, nor keep the existing equity of redemption in force.

3. This leads to the remaining, and perhaps to the parties the most important question, whether this surrender of the defeasance and extinguishment of the equity was good against the creditors of

Makepeace. This depends mainly on the questions of fact, to which much evidence was taken, whether this arrangement was made with an intent to delay, defeat or defraud the creditors of Makepeace; whether there was a secret trust on the part of the respondents to hold the same, in whole or in part, for the benefit of the mortgagor; and whether there was such a disparity between the value of the estate and the amount for which it was taken as to lead to a reasonable inference of any such fraudulent intent.

(After an examination and summing up of the evidence:)

Upon the whole evidence the court are of opinion that the transaction was not fraudulent, that the equity of redemption was relinquished before the attachment, and that the complainant did not acquire a right to redeem under the officer's deed.))

Bill dismissed.

GREEN v. BUTLER

SUPREME COURT OF CALIFORNIA, 1864

(26 Cal. 595)

APPEAL from the District Court, Twelfth Judicial District, city and county of San Francisco.

This action was brought to compel an accounting and a reconveyance of the property. Plaintiff claimed that the deed and defeasance constituted a mortgage, and that Leavitt, unknown to plaintiff, had paid Butler a large portion of the sum mentioned in the defeasance before the execution of the same, and that the amount thus paid by Leavitt, and the proceeds of the property received by Butler as mortgagee in possession, had satisfied the mortgage, and that Leavitt and Butler had combined together to defraud plaintiff.

The other facts are stated in the opinion of the court.

By the court, SAWYER, J. The referee finds, among other facts, that prior to the 14th of August, 1854, the plaintiff was in possession of the lands described in the complaint; that on that day, for a valuable consideration, he conveyed the said lands and improvements thereon by a deed absolute on its face to the defendant Butler; that although the deed was absolute on its face, it was intended as a mortgage to secure to said defendants certain moneys, due and to grow due, for erecting buildings and improvements thereon for a firm composed of plaintiff

and defendant Leavitt; that on the 20th of October, 1854, the said firm of Green & Leavitt had an accounting with defendant Butler, and that upon said accounting it was found and agreed by all parties that said firm was indebted to said Butler for constructing said improvements in the sum of eight thousand five hundred dollars; that on said 20th day of October said Butler executed and delivered to said Green & Leavitt a written defeasance, whereby he bound himself, upon the payment by them to him on or before March 1, 1855, the said sum of eight thousand five hundred dollars, to convey by quit-claim to said Green & Leavitt the said premises, and covenanted in said defeasance that if, after said 1st day of March, he should sell said premises, he would pay over to said parties any surplus that might arise over his debt and costs; that said defendant Butler on the 1st of February, 1855, with the consent of said plaintiff and said defendant Leavitt, entered into possession of said premises and continued in possession till the 27th day of February, 1855.

"That on the said 27th day of February, A. D. 1855, at said city and county, the said plaintiff and the said defendant, Joseph E. Butler, had an accounting and settlement of and concerning the said plaintiff's interest in and to the land described in said complaint, and the improvements then thereon, and of the furniture then in said 'Ocean House;' on which accounting and settlement the said defendant, Joseph E. Butler, paid to the said plaintiff the sum of two thousand dollars, in four promissory notes, for said plaintiff's interest in and to said land and the improvements thereon, and the furniture then in said house, which said notes were subsequently paid; and the said plaintiff then and there, in consideration of said sum of two thousand dollars, surrendered the said written defeasance to the said defendant, Joseph E. Butler, for cancellation, and the same was thereby cancelled as against the said plaintiff."

The only question arising on the record is as to the effect upon the rights of the parties as to the relief sought in this action, of the surrender of the defeasance to be cancelled, under the agreement found by the referee. The principles stated in the numerous cases cited by appellant's counsel are generally admitted to be correct. But there can be no doubt that a mortgage can make a *bona fide* purchase of the equity of redemption—if, indeed, we may use these terms in the present condition of the law as to mortgages in this State—and thereby acquire an absolute title. The principle is well stated in *Remsen v. Hay*, 2 Edw. Ch. 535, in the follow-

ing terms: "There is nothing in the policy of the law to prevent a mortgagee from acquiring an absolute ownership by purchase from the mortgagor at any time subsequent to the taking of the mortgage, and by a fresh contract to be made between them. Courts view with jealousy and suspicion any dealings between the mortgagor and mortgagee to extinguish the equity of redemption; but if it be fair and honest on the part of the mortgagee, the purchase will not be disturbed. The law only prohibits a mortgagee from availing himself of a stipulation contained in the mortgage deed, or of some covenant or agreement forming part of the same transaction with the loan and the taking of the security, by which he shall attempt upon the happening of some future event or contingency to render the estate irredeemable and obtain an absolute ownership. In such cases the maxim applies of 'Once a mortgage, always a mortgage' (*Henry v. Davis*, 7 John. Ch. 40; *Clark v. Henry*, 2 Cow. 332). But it cannot interfere with the right to foreclose when the mortgage has become forfeited, nor with any fresh contract which the mortgagor may choose to make with the mortgagee for a sale or relinquishment of the equity of redemption and vesting the latter with an irredeemable estate." There are numerous authorities to the same effect (1 Wash. Real Prop., p. 496, §§ 23, 24; *Dougherty v. McColgan*, 6 Gill. & J. 275; *Russell v. Southard*, 12 How. 154; *Adams v. McKenzie*, 18 Ala. 698).

Independent of authority, no argument is necessary to show that, upon principle, a mortgagor has the same capacity to contract with reference to his interest in the mortgaged property that he has in respect to any other property. Nor has section two hundred and sixty of the Practice Act, or any of the former decisions in this State relating to mortgages, placed any restriction upon the authority of the mortgagor to make other and further contracts affecting his title to the land subsequent to the execution of the mortgage. The language of Mr. Justice Field in *McMillan v. Richards*, 9 Cal. 365, cited by counsel, that "the owner of a mortgage in this State can in no case become the owner of the mortgaged premises, except by purchase upon sale under judicial decree, consummated by conveyance," must be limited to the question then under discussion. He was simply endeavoring to show that no title passed by the mortgage alone, either before or after default, or could be acquired under it by strict foreclosure or in any other manner than by a sale under a decree of a court, and that in such case the title did not vest till consummated by a conveyance after the period for redemption had expired. He had no reference to a contract affecting the

title, made by the mortgagor himself subsequent to the making of the mortgage. Reference was only made to the possibility of acquiring title through the mortgage, independent of any further action on the part of the mortgagor.

In this case, according to the finding of the referee, there was a settlement between the plaintiff and defendant Butler, by which the said Butler paid to plaintiff for his interest in the lands and improvements in dispute and the furniture in the Ocean House, situated on the premises, the sum of two thousand dollars, and the plaintiff, in consideration thereof, surrendered the defeasance to defendant Butler "for cancellation, and the same was thereby cancelled as against the said plaintiff." According to the finding, the sum of eight thousand five hundred dollars was secured on the premises, which premises on said 27th of February, 1855, were only worth seven thousand five hundred dollars.

The referee found that there was no fraud in any of the particulars charged in the complaint, and the finding in respect to the charges of fraud are sufficiently specific, as it negatives every allegation of fraud.

He does not say in so many words in his finding that the mortgage debt remained unpaid; but it is the necessary result of the findings that such was the case, and that the full amount was due. If we were permitted to re-examine the evidence in the record, we are not prepared to say he erred. The parties, at the time of the execution of the defeasance, struck a balance themselves, and the evidence to disturb their own settlement is exceedingly loose and unsatisfactory.

The surrender of the defeasance to be cancelled with an intent to vest the entire estate in Butler did not in law convert the mortgage into a deed or operate as a conveyance of Green's title to Butler. Whether it operated by way of estoppel in equity to vest the title in Butler or not, it is not now necessary to determine. The deed to Butler being absolute on its face, the title upon the record is apparently in him. The plaintiff seeks the aid of a court of equity to compel a conveyance of the land in controversy on the ground that the conveyance to Butler was a mortgage, and that the mortgage has been satisfied. The defendant Butler contests the claim and shows that instead of the mortgage being satisfied he had paid the full value of the premises with the understanding that he had purchased the plaintiff's interest, and that the defeasance was surrendered to be cancelled in pursuance of the agreement between the parties. Butler afterward continued in possession as owner.

If Butler did not obtain the title in law, he paid for it its full value, and supposed the title to be vested in him by the surrender and cancellation of the defeasance with the intention of so vesting it. The surrender of the defeasance to Butler to be cancelled, and the retention of it by him, is in law a cancellation of that instrument, though not actually destroyed.)

A court of equity will not aid plaintiff to obtain a conveyance, under the circumstances of this case, in direct violation of his own agreement and in fraud of the rights of defendant Butler.)

Upon the allegations of the plaintiff's complaint, it is at least extremely doubtful whether the conveyance to Butler can be regarded as a mortgage at all. The distinct allegations of the complaint are, not that the land was conveyed by plaintiff to secure the amount due Butler, but that Butler represented that there were certain mechanics' liens on the Ocean House which the claimants were pressing and threatening to foreclose; that "said Butler was unable to procure the money from his own means to satisfy the said demands, and could not procure the money for that purpose, unless the said plaintiff would convey to the said Butler the said twenty-five acres of land, in order that the said Butler might mortgage the said land and buildings to procure the necessary funds; and that the said plaintiff, confiding, etc., did, on the said 14th day of August, 1854, make, execute and deliver to the said Butler a deed of the said twenty-five acres of land for the purpose aforesaid, and not absolutely, nor for other purpose," and plaintiff's counsel contends that the testimony really established these very allegations, and nothing more, with respect to the object of the conveyance at the time; and if we could look at the testimony, it does seem to tend strongly in that direction. Now if this was the only object of the conveyance at the time it was made, it certainly was not at that time in any sense a mortgage. It was a conveyance of the title to Butler, not to secure his demand, but to enable Butler to mortgage it to raise money to pay off the liens of the mechanics. And such a conveyance certainly passed the fee at the time. True, Butler would have held the legal title in trust for plaintiff, but upon what principle can it be said that afterwards, in October following, the execution of the instrument, which has been called a defeasance—an entirely distinct transaction—transmuted the original conveyance in fee into a mortgage? In *Trull v. Skinner*, 17 Pick. 216, it was held that where a deed was executed and at a subsequent time a defeasance was also executed, the deed and defeasance subsequently executed did not together constitute

a mortgage, because the defeasance was not executed at the same time with the deed, and was not a part of one and the same transaction. From the execution of the instrument called a defeasance and the facts found by the referee it is evident that the parties, at the time of the execution of the defeasance, intended to make the two instruments serve the purpose of a mortgage, whatever the legal effect of the transactions might be, as they also intended to vest full title in Butler by the subsequent surrender of the defeasance. The referee found the transaction to be a mortgage, contrary, perhaps, to these allegations of the complaint, and against the protest of the plaintiff. If not a mortgage, the legal title is certainly in the defendant Butler.

But it is not necessary to determine whether upon the facts alleged in the complaint the two instruments in law constituted a mortgage or not; for in either view, taken in connection with the other findings, we think the plaintiff is not entitled to any relief upon the case made by the record.

The judgment is therefore affirmed.¹

VILLA v. RODRIGUEZ

SUPREME COURT OF THE UNITED STATES, 1870

(12 Wall. 323)

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is an appeal in equity from the decree of the Circuit Court of the United States for the District of California. The appellant was the complainant in the court below. The decree was against him.

He seeks to redeem the premises in controversy according to the prayer of his bill. The defendant Rodriguez claims an indefeasible estate in them as regards the complainant and those from whom he derives title. The other defendants claim under a contract of purchase made with Rodriguez. The validity of the complainant's title, if his grantor had anything to convey, is not questioned. Nor is the original title of his grantor and of those who conveyed to him denied. But the defendants insist that the title of all those parties

¹ *Vennum v. Babcock*, 13 Ia. 194 St. 1 (1877); *Bazemore v. Mullins*, (1862); *West v. Reed*, 55 Ill. 242 52 Ark. 207 (1889), accord. *Jones v.* (1870); *Show v. Walbridge*, 33 Oh. *Blake*, 33 Minn. 362 (1885), contra.

was vested absolutely in Rodriguez by deeds duly made and recorded before the conveyances to the complainant and his grantor were executed. The complainant insists that Rodriguez, after, as before, the legal title was conveyed to him, held the premises only as security for a debt. This is the hinge of the controversy between the parties.

The entire tract, of which the premises in controversy form a part, was conveyed by José Maria Villavicencia on the 13th of April, 1852, to his seven children. He died in 1853. The widow and five of the children conveyed to Fulgencio, also one of the children, on the 16th of December, 1867. On the 26th of the same month Fulgencio conveyed to the complainant. By virtue of this conveyance he claims six-sevenths of the tract. That proportion is his if his title be valid.

The widow is the sister of the defendant Rodriguez. On the 4th of December, 1860, she and three of the children, the other four being under age, executed to Rodriguez for money then borrowed a note for four thousand dollars, payable a year from date and bearing interest at the rate of two per cent. a month, payable at the end of each six months thereafter; the interest, "if not so paid, to be added to the principal and draw interest at the same rate, compounding in the same manner." A mortgage upon the entire tract was given at the same time by the makers of the note to secure its payment. The mortgage contained a provision that in default of the payment of the interest as stipulated the principal should become due and payable at the option of the mortgagee, and that the mortgage might thereupon be foreclosed and the premises sold to satisfy the mortgage debt; and that out of the proceeds of the sale the mortgagee should be authorized to retain, besides his debt and costs, a counsel fee of five per cent. upon the amount found to be due. The mortgage contained a further provision that the mortgagee might pay all taxes and incumbrances on the property, and that the amount of such advances should be secured by the mortgage, and should also bear interest at the rate of two per cent. per month. Rodriguez subsequently paid \$1,172 to redeem the property from a sale for taxes. On the 29th of April, 1864, the widow and five of the children conveyed to him by a deed absolute in form. It is recited in the deed that the debt secured by the mortgage then amounted to about \$10,000. On the 17th of February, 1865, one of the children, who was a minor when this deed was executed, and hence had not joined in it, also conveyed to Rodriguez. Nothing was paid to the grantor. On the 20th of May, 1865,

the other and seventh child, who had then become of age, executed a like conveyance. The consideration paid was \$100.

On the 22d of July, 1866, Rodriguez demised the premises so conveyed to him to his co-defendants, Edgar W., Isaac C., and Rensselaer E. Steele. The defendant, George Steele, subsequently became interested in this contract by an arrangement with the lessees. The leasehold term was for five years from the 1st of August, ensuing its date. Rodriguez stipulated that at the end of the term or within five days thereafter the lessees might purchase by paying him \$25,000 in gold, and upon such payment being so made, he covenanted that he would, by a sufficient deed, release and quit-claim to the lessees or their heirs and assigns, free from all incumbrances created by him, all the right and title which he then had to the premises or which he might thereafter acquire from the United States or from any of the heirs of José Maria Villavicencia.

The lessees and their assignees insist that they are *bona fide* purchasers without notice.

This proposition cannot be maintained. The contract gave them the option—it did not bind them—to buy at the time specified. That time had not arrived when this bill was filed. *Non constat* that they would then exercise their election affirmatively and pay the stipulated price. But this point is not material. The doctrine invoked has no application where the rights of the vendee lie in an executory contract. It applies only where the legal title has been conveyed and the purchase-money fully paid (*Nace v. Boyer*, 30 Pennsylvania, 110; *Boone v. Chiles*, 10 Peters, 177, 211). The purchaser then holds adversely to all the world, and may disclaim even the title of his vendor (*Crozzall v. Shererd*, 5 Wallace, 289).

This contract calls for a quit-claim deed. The result would be the same if such a deed had been executed and full payment made without notice of the adverse claim. Such a purchaser cannot have the immunity which the principle sought to be applied gives to those entitled to its protection (*May v. Le Claire*, 11 id. 232; *Oliver v. Piatt*, 3 Howard, 363). This contract may, therefore, be laid out of view. It is no impediment to the assertion of the complainant's rights, whatever they may be. It does not in any wise affect them.

The law upon the subject of the right to redeem where the mortgagor has conveyed to the mortgagee the equity of redemption is well settled. It is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where a sale by a *cestui que trust* to his trustee is drawn in question. To give validity to such a sale by a mortgagor it must be shown that

the conduct of the mortgagee was, in all things, fair and frank, and that he paid for the property what it was worth. He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears or poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of the instruments employed is immaterial. That the mortgagor knowingly surrendered and never intended to reclaim is of no consequence. If there is vice in the transaction, the law, while it will secure to the mortgagee his debt with interest, will compel him to give back that which he has taken with unclean hands. Public policy, sound morals, and the protection due to those whose property is thus involved, require that such should be the law (*Morris v. Nixon*, 1 Howard, 118; *Russell v. Southard*, 12 *id.* 139; *Wakeman v. Hazleton*, 3 Barbour's Chancery, 148; 4 Kent's Commentaries, 143; *Holmes v. Grant*, 8 Paige, 245; 3 Leading Cases in Equity, 625).

The terms exacted by the loan by Rodriguez were harsh and oppressive. The condition of the widow and orphans might well have touched his kindred heart with sympathy. It seems only to have whetted his avarice. Two per cent. a month—and this, if not paid as stipulated, to be compounded—was a devouring rate of interest. It was stipulated that the further advances should bear interest at the same rate. He demanded an adjustment when, from the failure of the crops and other causes, the property was greatly depressed, and he knew the widow and her children had no means of payment. The alternatives presented were an absolute conveyance of the property or a foreclosure and sale under the mortgage. He was anxious to procure the deed, and exulted when he got it. The debt and advances, with the interest superadded, were much less than the value of the property. The note and mortgage were executed by three of the children and the widow—the deed by the widow and five of the children. The other two children conveyed at later periods. The consideration of the conveyance by the four children not parties to the note and mortgage was such that if an absolute title passed, their deeds must be regarded as deeds of gift of their shares of a valuable estate. Dana, who took the acknowledgment of the deed executed by the widow and five children, testifies that the widow inquired whether the deed contained all the agreements between her and Rodriguez. Dana translated it to her. She complained that the agreements were omitted. Rodriguez in-

sisted that they were in the deed, and added "that they ought not to distrust him, as he was taking all these steps for their interest." The widow and children then executed the deed. Dana, speaking of a subsequent conversation with Rodriguez on the same day, "which was altogether unsolicited," says: "He stated to me that his object in getting the Villavicencia family to execute the deed aforesaid was to secure his money, money which he had loaned or advanced to them, and save the property for the benefit of his sister and her family; while if it remained in their hands he might lose his money, and his sister and her children would lose the whole property. He said they had done wisely in trusting him, as he intended to deal justly by his sister." Rodriguez was examined as a witness. Referring to a period shortly preceding the execution of this deed, he says: "Afterwards I had with them further conversation, and told them, I don't wish to speculate upon you, because you are my relations, and you have treated me well. If I can sell the ranch for enough to reimburse myself for my outlays as well as interest, I will return you the surplus money, if any; and, also, if I can sell a portion of the ranch or enough to reimburse myself for my advance, I will do the same, and return to you the unsold portion of the ranch; but if I have bad luck and cannot sell it, I will lose my money." Elsewhere in the same deposition he says: "I stated at the ranch, and again stated to my sister afterwards, that I would return the surplus money, but it was no obligation of mine. It may be that I said so to Charles Dana at that time."

He made the same admissions to other persons who are in no wise connected with this litigation. Their testimony is found in the record. It is unnecessary to extend the limits of this opinion by accumulating and commenting upon it. The widow and five of the children, all who have been examined, testify that they understood the deeds to be only security for the debt. This explains the transaction as to those who were not parties to the note and mortgage. There is no other way of accounting for their conduct. The testimony of Rodriguez alone is sufficient to turn the scale against him. He cannot repudiate the assurances upon which his grantors were drawn in to convey. To permit him to do so would give triumph to iniquity. The facts indisputably established bring the case clearly within those principles by the light of which, in determining the rights of the parties, the judgment of this court must be made up. The complainant stands in the place of those from whom he derives title. He is clothed with their rights, and is entitled to redeem six-sevenths of the premises upon paying that proportion

of the mortgage debt and interest. The former must be held to include the amount advanced, as well as that represented by the note, and the latter be settled by the terms of the contract and the law of California. The rents, issues, and profits, and improvements made upon the premises must also be taken into the account.

The decree is reversed, and the cause will be remanded to the circuit court with directions to enter a decree and proceed

*In conformity to this opinion.*¹

ODELL v. MONTROSS

COURT OF APPEALS OF NEW YORK, 1877

(68 N. Y. 499)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department in favor of defendant, entered upon an order reversing a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term and directing judgment for defendant.

This action was brought to have a deed, absolute on its face, declared a mortgage, and for an accounting and reconveyance on payment of amount due.

The court found, in substance, that in July, 1865, plaintiff, being indebted to defendant for moneys loaned and advanced, executed to said defendant a deed of the premises described in the complaint, which deed was absolute on its face and purported to convey the fee, but that it was executed as and intended as a security for the said indebtedness then existing and what might thereafter accrue; and it was agreed and intended by the parties that plaintiff, upon payment, should have the right to redeem and should be entitled to a reconveyance. That in September, 1866, defendant paid to the plaintiff at his request the sum of fifty dollars, and plaintiff then and there signed and delivered to the defendant a paper, of which the following is a copy, viz.:

"NEW YORK, Sept. 17, 1866.

"Received from William Montross fifty dollars, in full satisfaction for all claims and demands whatsoever as to the conveyance of property, or otherwise, up to this date.

"THOMAS B. ODELL."

¹ *Vernon v. Bethell*, 2 Eden, 110 (1877), *accord*. Compare *Russell v. Southard*, p. 146, *supra*.
(1761); *Peugh v. Davis*, 96 U. S. 332

That such payment was made and received and such receipt signed and delivered with the intention of the parties that the same should be a full settlement of all claims of plaintiff to said lands and premises and of all claims to any reconveyance thereof. As conclusions of law the court found that the deed was to be considered as a mortgage; that the payment of the fifty dollars and the receipt given therefor did not operate to change the nature of the deed from a security to an absolute conveyance, nor to release plaintiff's right to redeem, and that, upon payment of the sums due from plaintiff to defendant and the sums paid out by the latter, plaintiff was entitled to redeem; and judgment was directed adjudging that upon payment of such sums within thirty days defendant should reconvey, and in default of such payment that the premises be sold, as in foreclosure sales.

Judgment was entered accordingly.

ALLEN, J. Prior to the transaction of the seventeenth of September, 1866, when the defendant upon the payment of fifty dollars to the plaintiff took an unsealed paper signed by him acknowledging the receipt of the fifty dollars "in full satisfaction for all claims and demands whatsoever as to conveyance of property or otherwise up to this date," the relation of the parties in respect to the lands now sought to be redeemed was that of mortgagor and mortgagee with all the incidents of that relation (4 Kent's Com. 143). The plaintiff had conveyed the premises to the defendant by deed absolute in terms, but the conveyance was not intended as a sale, but as a security for the payment of money, and although there was no defeasance in writing, the intent could be and was shown by parol evidence, and the deed was but a mortgage.¹ Parol evidence is admissible to show that an absolute deed was intended as a mortgage, or that a defeasance has been destroyed by fraud or mistake (*Dey v. Dunham*, 2 J. Ch. R. 182; *Clark v. Henry*, 2 Cow. 324;

¹ See New York Real Property Law, § 320: "*Certain deeds deemed mortgages.*—A deed conveying real property, which, by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage; and the person for whose benefit such deed is made, derives no advantage from

the recording thereof, unless every writing, operating as a defeasance of the same, or explanatory of its being desired to have the effect only of a mortgage, or conditional deed, is also recorded therewith, and at the same time."

This section is commented upon in *Matter of Mechanics' Bank*, 156 App. Div. 343, 347 (1913).

Marks v. Pell, 1 J. Ch. R. 594; *Horn v. Keteltas*, 46 N. Y. 605). A conveyance absolute in terms given as a security is a mortgage with all the incidents of a mortgage, and the rights and obligations of the parties to the instrument are the same as if the deed had been subject to a defeasance expressed in the body of the instrument or executed simultaneously with it (4 Kent's Com., *supra*). It must be recorded as a mortgage and not as a deed. *Dey v. Dunham*, *supra*. This case was reversed in 15 Johnson's Reports, 555, but this principle was recognized by the appellate court that reversed the decree of the chancellor. The reversal was on the ground that the subsequent purchaser claiming adversely to the deed was not a purchaser in good faith, and so not within the protection of the recording acts (*James v. Johnson*, 6 J. Ch. R. 417; 2 Cow. 249). In *White v. Moore*, 1 Paige, 551, the chancellor held that the fact that there was no defeasance in writing did not take the instrument out of the effect of the statute requiring all mortgages to be recorded as mortgages.

The estate remaining in the mortgagor after the law day has passed, before foreclosure, is popularly but erroneously called an equity of redemption, retaining the name it had when the legal estate was in the mortgagee and the right to redeem existed only in equity. Although a misnomer, it does not mislead. The legal estate remains in the mortgagor and is subject to dower and curtesy, to the lien of judgments, may be sold on execution and may be mortgaged or sold as any other estate in lands, while the mortgagee has but a lien upon the lands as a security for his debt, and the land is not liable to his debts, or subject to dower or curtesy, or any of the incidents of an estate in lands (2 Wash. R. P. 152 and *seq.*; *Jackson v. Willard*, 4 J. R. 41; Powell on Mortgages, 258, N. L.). The mortgagor is possessed of an estate in the land in virtue of his former and original right, and there is no change of ownership. So far as the entire estate is concerned there is but one title, and this is shared between the mortgagor and mortgagee, the one being the general owner and the other having a lien which, upon a foreclosure of the right to redeem, may ripen into an absolute title, their respective parts when united constituting one title. A mortgagor and mortgagee may at any time after the creation of the mortgage and before foreclosure make any agreement concerning the estate they please, and the mortgagee may become the purchaser of the right of redemption. A transaction of that kind is, however, regarded with jealousy by courts of equity, and will be avoided for fraud, actual or constructive, or for any unconscionable advantage

taken by the mortgagee in obtaining it. It will be sustained only when *bona fide*; that is, when in all respects fair and for an adequate consideration (*Trull v. Skinner*, 17 Pick. 213; *Patterson v. Yeaton*, 47 Maine, 306; *Ford v. Olden*, L. R. 3 Eq. Cases, 461; *Kaldridge v. Gillespie*, 2 J. Ch. R. 30; Wash. on Real Prop., ch. 16, § 1, pl. 24).

The defendant claims to have extinguished the right of redemption and acquired the entire estate by the payment of the fifty dollars and in virtue of the written acknowledgment of its payment for the purposes named in it. The paper is in its terms ambiguous. It does not purport to convey or transfer any property or estate in lands, but is declared to be in full of all claims and demands whatsoever as to conveyance of property or otherwise. It is but a parol admission of a satisfaction for the right mentioned. The apparent meaning of the instrument is to admit a satisfaction of all claims against the defendant, claims and demands that may be enforced whether such claims are of a right to a conveyance of property or any other matter. The plaintiff required no conveyance of the lands from the defendant. Upon the payment of the mortgage debt he would have been reinvested with the unincumbered title without conveyance or release from the defendant. As evidence of his title he might have required a reconveyance or a satisfaction of the mortgage, and that the courts would have compelled. But his right of redemption was not in any sense a "claim or demand as to conveyance of property or otherwise." The receipt had, upon its face and without explanation, respect to personal claims and demands against the defendant. But the transaction was explained upon the trial and shown to have been intended as a full settlement of all claims of the plaintiff to the lands and premises and of all claims to a reconveyance thereof. If this payment and receipt did operate to change the nature of the deed from a mortgage to an absolute conveyance, and is a release of the right to redeem so that the mortgagee became seized in fee simply by a union of the estates of the mortgagor and mortgagee discharged of the mortgage, the defence to the action is perfect. It cannot be claimed that the written paper *ex proprio vigore* could have that effect. It does not profess to release the right of redemption or to convey any lands or interest in lands. No lands in particular are referred to. No agreement can be spelled out of the instrument which could be specifically performed, and it could not be aided and made a perfect contract to release or convey lands by parol proof. The whole force of the transaction, as affecting the rights of the plaintiff, is in

the payment and receipt of the fifty dollars with intent to extinguish the title of the plaintiff. This cannot operate as an estoppel or take the case out of the statute of frauds. The mere payment of money will not entitle a purchaser to a specific performance of a parol contract for the purchase of an interest in lands. That can be repaid with interest, and no damage ensues from the non-performance of the contract. The purchaser can be made good for the use of his money, which is all that he has lost. Had the defendant, acting upon the faith of this transaction, entered into possession of the premises and incurred expenses, and substantially changed his situation so that he could not be placed in the same situation in which he was before, it might have estopped the plaintiff from taking shelter under the statute of frauds, or alleging the insufficiency of the written instrument to carry out the agreement and intent of the parties. But there are none of the elements of an equitable estoppel in the case as presented by the record.

The plaintiff having a recognized legal estate in fee, he could only be divested of it (except by way of estoppel which does not exist) by some instrument which would be valid under the statute of frauds and in compliance with the statute prescribing the mode and manner of conveying lands. The statute of frauds (2 R. S. 135, § 8) is very explicit, and needs no interpretation in its application to this case. It declares that every contract for the sale of any lands or any interest in lands shall be void unless in writing and subscribed by the party by whom the sale is to be made. The whole contract, that is, the agreement to sell and the description of the lands or the interest in lands agreed to be sold, must be in writing and subscribed by the party. The other statute referred to (1 R. S. 738, § 137) is equally applicable to this case. To hold that the plaintiff had not a fee, would be to overthrow the well-established relation of mortgagor and mortgagee and reverse their respective positions in respect of the legal estate in the lands mortgaged. The statute declares that every grant in fee or of a freehold estate shall be subscribed and sealed by the person making the grant or his lawful agent. If a seal only was wanting to make the instrument relied upon by the defendant valid for the purposes intended, it is possible the court might compel the sealing, but that would not supply the intrinsic defects of the paper-writing itself.

What is said in *Stoddard v. Whiting*, 46 N. Y. 633, of the nature of the estate of a mortgagor and the bearing of the statutes quoted upon a conveyance of his estate, was not necessary to the decision of the case or necessarily adjudged by the court. The plaintiff

there, who was enforcing an equity of redemption, which was resisted, claimed under a written but unsealed assignment (a parol writing) from the mortgagor, and that was held sufficient to give him a standing in court and enable him to maintain the equitable action to redeem. The decision is not in conflict with the views here expressed. The defendant could have acquired the estate and interest of the plaintiff either by a deed-poll, as a release or a grant, in any form sufficient in terms and mode of execution to convey an estate in lands. Mr. Powell, in his treatise on mortgages, vol. 1, p. 260, in speaking of the methods by which a mortgagee may acquire the interest of the mortgagor, says that it may be by indenture with covenants or a release by deed-poll, for by that means the estate of the mortgagor and mortgagee will become merged, and the mortgagee will be owner in fee of the whole estate.

The rights of the mortgagor and his estate can only be foreclosed by due process of law, or a release by deed in proper form, or a conveyance sufficient to pass the title to an estate in fee. The defendant has not purchased the equity of redemption or acquired the estate of the plaintiff by any proper release or conveyance. No injustice will be done the defendant by the result to which this conclusion leads. He will receive his money and interest, and will be fully indemnified, and he is not entitled to speculate in his dealings with his mortgage-debtor.

The judgment of the Special Term might have directed a redemption, upon the proper terms, within a specified time, or in default thereof the plaintiff be foreclosed. That, I think, would have been the proper judgment. But as no fault is found with the terms of the judgment at Special Term, the judgment of the General Term should be reversed and that of the Special Term affirmed.

All concur, except RAPALLO, J., not voting.

*Judgment accordingly.*¹

¹ Accord, *Reich v. Dyer*, 91 App. Div. (N. Y.) 240 (1904); *Conover v. Palmer*, 123 App. Div. (N. Y.) 817, 821. But cf. *Luessenhop v. Einsfeld*, 93 App. Div. (N. Y.) 68, 73 (1904).

CHAPTER II (*Continued*)

SECTION III—AGREEMENTS FOR COLLATERAL ADVANTAGE— CLOGGING THE EQUITY OF REDEMPTION

JENNINGS *v.* WARD

HIGH COURT OF CHANCERY, 1705

(2 *Vern.* 520)

THE defendant Ward lends money to Neale, the groom porter, to carry on his buildings in Cock and Pye fields, and took a mortgage from him to secure sixteen thousand pounds with interest at £6 per cent., and in another deed, executed at the same time, took a covenant from Neale that he should convey to the defendant, if he thought fit, ground rents to the value of sixteen thousand pounds, at the rate of twenty years' purchase. The bill being to redeem, the defendant insisted on that agreement; but the MASTER OF THE ROLLS [SIR J. TREVOR] decreed a redemption, on payment of principal, interest and costs, without regard to that agreement; but set aside the same as unconscionable. A man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement.

ORBY *v.* TRIGG

HIGH COURT OF CHANCERY, 1822

(9 *Mod. Rep.* 2)

THE brother of the now plaintiff mortgaged his lands to the defendant, and afterwards died. In the deed of mortgage there was a covenant to reconvey upon six months' notice of the payment of the principal sum and interest; and another covenant that, in case the estate was to be sold, the mortgage should have the pre-emption. After the death of the brother, who was the mortgagor, his widow delivered up the counterpart of the mortgage to the attorney of the mortgagee.

The plaintiff having given the defendant six months' notice that he would pay the principal and interest, and having it ready to pay, the defendant refused to accept it. The plaintiff thereupon exhibited his bill for a reconveyance of the estate, having entered into articles with a purchaser for the sale thereof. The defendant, by his answer, insisted on the covenant in the deed to have the pre-emption.

But it appearing that neither the plaintiff nor the purchaser knew anything of this covenant, for that the counterpart of the mortgage was delivered up as aforesaid; and that the plaintiff had often made application to the mortgagee for a copy thereof, which was as often denied, he insisting only to have the principal and interest paid, for that the security was too narrow for the money which he had lent; and that if it was not paid by such a time, he would foreclose the equity of redemption, but never mentioned that he was to have the benefit of pre-emption until after the estate was sold; therefore he ought not now to claim it, to the prejudice of the purchaser and of the plaintiff, having so long time for that purpose before the estate was sold.

And it was decreed accordingly, and the mortgagee to reconvey upon payment of the principal and interest, &c.

BROAD v. SELFE

COURT OF CHANCERY, 1863

(11 *Weekly Rep.* 1036)

THIS was a foreclosure suit. The plaintiffs prayed an account of what was due to them for principal moneys and interest, commission and expenses, under the agreement hereinafter set forth; payment by the defendant of the amount so to be found due, or, in default, foreclosure.

It appeared that in June, 1861, the plaintiffs lent to the defendant £200 on his promissory note, which was due in the September following, but was dishonored. On the 30th of September, 1861, the defendant gave to the plaintiffs a new promissory note for the same amount, and also signed a Memorandum of Agreement, as follows:

"Memorandum of Agreement made this 30th day of September, 1861, between Peter Broad and Taylor Pritchard, of 28 Poultry, in the city of London, auctioneers, and John Selfe, of Surbiton Hill, in the county of Surrey. Whereas, in consideration of the said Peter

Broad and Taylor Pritchard advancing to the said John Selfe the sum of £200 upon the security of a piece or parcel of land known as 'The Park,' Surbiton Hill, &c., the said John Selfe hereby authorizes and instructs the said Peter Broad and Taylor Pritchard to sell and dispose of the whole or any portion of the land as above named, either by private or public sale, at and for the best price that can be obtained; and further, to repay themselves out of the proceeds of such sale the said sum of £200, with interest at the rate of 5 per cent. per annum from the date hereof, with a commission of 5 per cent. on the amount realized, and the expenses attending the sale thereof; and in the event of the said John Selfe repaying the said Peter Broad and Taylor Pritchard the aforesaid sum of £200 and interest, the said John Selfe shall pay to the said Peter Broad and Taylor Pritchard a commission of 5 per cent. on the value of the said property, together with all the expenses incurred by them, whether the property or any portion thereof is sold by any other agency or retained by the said John Selfe. The said John Selfe further undertakes to execute a legal mortgage of the above-mentioned lands and buildings to the said Peter Broad and Taylor Pritchard at his own expense whenever called upon by them so to do, such mortgage to contain all the usual and customary covenants, and particularly power of sale, either by private contract or public auction."

The plaintiffs, in pursuance of the authority given to them by the agreement, made all the necessary arrangements for proceeding to a sale of the premises mentioned in the Memorandum, and in so doing incurred considerable expense; but in February, 1862, the defendant gave the plaintiffs notice that he revoked the authority so given, and the premises were accordingly not sold. The value of the property was about £8,000. The plaintiffs applied to the defendant for payment of the principal, interest, and 5 per cent. commission (£400), and expenses, which they alleged to be due to them; but the defendant declined to recognize their claim to the 5 per cent. commission, and in March, 1862, the defendant tendered to the plaintiffs the sum of £200 and interest, and £15 for any expenses the plaintiffs might have incurred in the matter.

The present suit was afterwards instituted, and the cause now came on upon motion for decree.

The MASTER OF THE ROLLS [LORD ROMILLY] said the contract in this case was only a contract of mortgage to the extent of £200 principal, and the interest upon it; but not beyond this. His

Honour thought that the cases referred to by Mr. Roberts, and several others which he had consulted, showed the principle that the Court would not permit a person, under the colour of a mortgage, to obtain a collateral advantage not belonging or appurtenant to the contract of mortgage. Although this principle, in its origin, probably had reference to the usury laws, it went, in his Honour's opinion, beyond them, and was not affected by their repeal. The remedies of foreclosure and redemption were co-extensive, and it was clear that if the mortgagor had come to redeem the security, he would have been allowed to do so on payment of the principal sum of £200, interest, and costs, and then his Honour would have had to consider whether, under the recent Act of Parliament, the Court could not direct an inquiry as to what was properly due to the mortgagees in respect of services rendered as to the property under the agreement entered into between them and the mortgagor. The case was the same in foreclosure. Therefore, in making the usual foreclosure decree, his Honour proposed to direct a reference to chambers, to inquire what (if anything) was due to the plaintiffs in respect of expenses and services rendered by them under the agreement. With regard to the question of costs, generally speaking, in foreclosure suits, the mortgagee added his costs to his security; but it was equally clear that where the mortgagor had tendered his mortgage-money and interest prior to the suit, if the mortgagee came to foreclose, he must pay the costs of the suit. Here, no doubt, a tender had been made of the £200 principal and interest, and £15 for expenses, which the plaintiffs did not consider enough, and refused to accept. It was, however, to be remembered that the defendant had entered into this contract with the plaintiffs to pay them a commission with his eyes open; and, although this was a contract which the Court could not enforce by reason of want of mutuality—the Court not being able to compel the plaintiffs to perform the services required by the agreement—yet, as the defendant entered into this contract, he could not claim the same benefit from the tender which he might have done in a case of ordinary mortgage. The Court, therefore, could not give him the costs of the suit. Neither were the plaintiffs entitled to the costs of the suit, because they did not come simply to enforce a mortgage security, but they came to enforce what the Court considered they were not entitled to enforce. There would, accordingly, be no costs on either side up to the hearing. An account would be directed of what was due to the plaintiffs for the principal sum of £200 and interest at £5 per cent., and the

mortgagee's costs other than the costs of the suit, with the usual foreclosure decree. An inquiry what, if anything, was due to the plaintiffs in respect of expenses incurred and services rendered in relation to the property mentioned in the Memorandum of Agreement, and further consideration on that part of the case and the future costs, would be reserved.¹

BIGGS v. HODDINOTT

SUPREME COURT OF JUDICATURE—CHANCERY DIVISION, 1898

(L. R. [1898] 2 Ch. 307)

MOTION AND ADJOURNED SUMMONS.

The plaintiff Biggs was a brewer at Cardiff, the defendants Hoddinott were the owners of the Witchill Hotel, Cadoxton, Glamorganshire, in which they carried on their business as hotel keepers. The plaintiff had a mortgage on the hotel for £7654, which was secured by an indenture of March 18, 1896, by which the defendants covenanted, in the usual way, for payment of the principal, with interest at £5 per cent., on September 18 next. This deed also contained a joint and several covenant by the defendants that "they, their respective executors, administrators, and assigns, owners, or tenants for the time being of the said premises, will during the continuance of this security take of and deal with the plaintiff, his executors, administrators, or assigns only for all beers and stout or any other description of malt liquors (except bottled beers) which shall be vended to be consumed on or off the said hotel and premises; and while any money is owing on the security of these presents deal exclusively with the plaintiff, his executors, administrators and assigns for all malt liquors as aforesaid sold thereupon or upon any premises taken or used in connection therewith, or in anywise under or by virtue of the license or licenses now existing or being in force in respect of the same premises, including any occasional or subsidiary license, and will not sell or permit the sale or consumption upon the said premises of any such liquors as aforesaid (except bottled beers), other than such as shall have been purchased or taken of the plaintiff, his administrators or assigns." There was a proviso that "if the

¹ *Salt v. Marquess of Northampton* [1892], App. Cas. 1 (1891); *In re Edwards' Estate*, 11 Ir. Ch. 367 (1861),

accord. See, also, *Vilas v. McBride*, 62 Hun (N. Y.), 324 (1891), aff'd short, 136 N. Y. 634 (1892).

defendants, their executors, administrators, and assigns shall observe fully and in all respect the covenants on their part hereinbefore contained," then the plaintiff would not call in the loan for five years. The deed also contained a proviso that notwithstanding the proviso for redemption, the defendants should not be entitled to require or compel the plaintiff to receive his principal before the expiration of five years from the date of the deed. The plaintiff also covenanted with the defendants during the continuance of the security to supply them with beer and stout or other malt liquors of the usual quality at certain scheduled prices; but the deed in no way charged any money payable for beer, &c., upon the mortgaged premises.

In the spring of 1898 the defendants ceased to purchase their beer and stout from the plaintiff, and intimated that they did not intend to purchase any more malt liquors from him, as they were advised that they were not bound by the covenant to do so; and they also claimed to be entitled to redeem the mortgage at once.

On May 4, 1898, the defendants tendered to the plaintiff the amount of his principal and interest to date, with a further sum for six months' interest in lieu of notice; but the plaintiff declined to accept it.

On May 10 the mortgagors took out an originating summons against the mortgagee to compel redemption.

On May 23 the plaintiff commenced this action, claiming an injunction restraining the defendants during the continuance of the mortgage, their servants or agents, from selling or permitting the sale or consumption upon the Witchill Hotel of any beer, stout, or other malt liquors (other than bottled beers), which shall not have been purchased and taken from the plaintiff, and for damages.

The plaintiff moved before Romer, J., on June 10, 1898, for an interim injunction in the terms of his claim. The defendants' summons for redemption was adjourned into court, and came on for hearing with the motion.

ROMER, J.¹ There is a great principle which I think ought to be adhered to by this Court, and by every Court where it can possibly do so; that is to say, that a man shall abide by his contracts, and that a man's contracts should be enforced as against him. Undoubtedly there are certain principles of equity, especially those relating to mortgagors and mortgagees, which have to a certain extent interfered with that general principle, and with those

¹ Portions of opinions omitted.

cases I shall have to deal. But before I do so I wish in the first place to point out that, unless there is some doctrine of equity which would otherwise prevent me enforcing the covenant here, the covenant is one which in my opinion ought to be enforced; that is to say, looking at the circumstances (and there is no evidence before me which alters the circumstances as appearing on the face of the mortgage deed itself) it appears to me that the transaction entered into was a reasonable and proper one. The covenants entered into by the mortgagors and the mortgagee with reference to the supply and purchase of beer appear to me to have been reasonable and entered into in good faith, and are in no sense oppressive upon the mortgagors. Unless, therefore, there is some principle of equity affecting mortgagors and mortgagees which prevents me from enforcing this covenant, I ought to enforce it. I should be very sorry indeed if I found there was any such principle; and on considering the principles to which my attention has been called, and the authorities bearing upon them, I am glad to say that I do not think there is any principle or any authority which prevents me from enforcing this covenant as against the mortgagors.

Now, there is a principle which I will accept without any qualification for the purpose of my present judgment (although possibly even that principle might have to be considered narrowly with reference to special cases) that on a mortgage you cannot, by contract between the mortgagor and mortgagee, clog, as it is termed, the equity of redemption, so as to prevent the mortgagor from redeeming on payment of principle, interest, and costs. Of course, I mean redeeming at the time agreed upon between the parties for redemption.

Does that principle apply to the case before me so as to prevent this covenant by the mortgagors from being enforced against them? I am clearly of opinion that it does not. There is nothing in this covenant which clogs the equity of redemption. The mortgagors' right to redeem under the mortgage deed stands exactly the same whether this covenant to take the beer from the brewer, the mortgagee, is in the deed or not. The mortgagee by virtue or in respect of that covenant has no right to stop or check redemption. He could not stop redemption because there had been any breach of that covenant. There is no charge upon the mortgaged premises in favour of the mortgagee for any sums which might become due to him under or by virtue or by reason of any breach of that covenant by the mortgagors. It therefore appears to me impossible

to say that this covenant in any way interferes with the principle about not clogging the equity of redemption. But then it is said on behalf of the mortgagors that there is a much larger principle which would prevent this covenant from being held binding on them, and they say that the principle is stated in the case of *Jennings v. Ward*, 2 Vern. 520, which is a well-known authority, where the Master of the Rolls undoubtedly said that a man shall not have interest for his money and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement. I have already dealt with the question of clogging the redemption. It is said that the observations of the Master of the Rolls are to be taken to their fullest extent, and that in every case it is to be taken that a mortgagee shall not have interest for his money and a collateral advantage besides for the loan.

Now, I must say it appears to me always a good principle in dealing with general observations to bear in mind the case in which those observations were made, and with reference to what circumstances they were made. And when I turn and look at the circumstances of *Jennings v. Ward*, 2 Vern. 520, two things appear. In the first place, the Master of the Rolls was dealing in fact with a case where a mortgagor came to redeem, and it was sought to clog his redemption by saying that there was a collateral agreement with regard to other property which ought to prevent his being allowed to redeem. It was, in fact, a case of clogging the equity of redemption. But beyond that, when you look and see what was the collateral agreement in question there, it is to be observed it was one about which the Master of the Rolls said that it must be set aside as unconscionable. So that it was a case where the collateral agreement was unconscionable in itself, and it was in reference to a case like that that the Master of the Rolls made the observation that he did.

Putting aside questions of usury, and putting aside contracts which are oppressive, or which are exactions that a mortgagee is not allowed to make, I see no reason why a contract between mortgagor and mortgagee, entered into in good faith as a reason for the mortgagee advancing his money, should not stand and receive the support of this Court, subject to the limitation I have already pointed out as to clogging the equity of redemption. It appears to me, notwithstanding some observations that you may find, especially some made by Kay, J., in some of his decisions, which I think ought to be interpreted by reference to the special facts of the cases in which those observations were made, it is not true to say

that in every contract for a mortgage, every provision is void whereby a mortgagee gets more than the principal he advances, and his interest and costs. I think there is no objection (within the lines I have mentioned) to an advantage being derived by a mortgagee in his contract at the time, and as a term of the advance. Where such an advantage is part of the consideration for the advance, and the mortgagor has the benefit of the advance, he is *primâ facie* bound by it, unless he can bring himself within some of the limitations laid down by the cases to which I have already referred.

Finding, therefore, as I do in the result, an honest bargain entered into, the benefit of which has been obtained by the mortgagors, and finding, as I am glad to say and as I think, no principle or authority which prevents me from enforcing this contract on the mortgagors' part, I enforce it accordingly, and therefore grant the injunction in the terms of the notice, limiting it according to those terms during the continuance of the security; and the defendants, of course, must pay the costs.

C. A.

The defendants appealed from the order on the motion.

LINDLEY, M. R. We have listened to a very ingenious and learned argument with the view of inducing us under pressure to lay down a proposition of law which would be very unfortunate for business men. The proposition contended for comes to this—that while two people are engaged in a mortgage transaction they cannot enter into any other transaction with each other which can possibly benefit the mortgagee, and that any such transaction must be before or after the mortgage, and be independent of it, so that it cannot be said that the mortgagee got any additional benefit from the mortgage transaction. Mr. Farwell did not attempt to uphold this on any rational principle, but relied on authority. Of course, we must follow settled authorities whether we like them or not; but do they support this proposition? *Jennings v. Ward*, 2 Vern. 520, was the first case relied upon. That was a redemption suit, and the stipulation which was in question seriously interfered with the redemption of the mortgaged property, and the Master of the Rolls (Sir J. Trevor) decreed redemption without regard to that stipulation. He is reported to have said: “A man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement.” That has been understood as meaning exactly what was said, without regard to

the circumstances of the case, and has found its way into the text-books as establishing that a mortgagee cannot have principal, interest, and costs, and also some collateral advantage. But that supposed rule has been departed from again and again. Take the case of West India mortgages: it has been repeatedly decided that the mortgagee, if not in possession, may stipulate that he shall be appointed consignee. The proposition stated in *Jennings v. Ward*, 2 Vern. 520, is too wide. If properly guarded it is good law and good sense. A mortgage is regarded as a security for money, and the mortgagor can always redeem on payment of principal, interest, and costs; and no bargain preventing such redemption is valid, nor will unconscionable bargains be enforced. There is no case where collateral advantages have been disallowed which does not come under one of these two heads. To say that to require such a covenant as that now in question is unconscionable is asking us to lay down a proposition which would shock any business man, and we are not driven to it by authority. The proposition laid down by Hargreave, J., in *In re Edwards's Estate*, 11 Ir. Ch. Rep. 367, that where an onerous contract entered into by a mortgagor with his mortgagee is part of the arrangement for the loan, and is actually inserted in the mortgage deed, it is presumed to be made under pressure, and is not capable of being enforced, goes too far, though the decision of the learned judge was correct; for the stipulation with which he had to deal was unreasonable, and one which ought not to be enforced. The appeal will be dismissed.

CHITTY, L. J. The mortgage here is a mortgage of a public house for a time certain by publicans to a brewer, effected in the usual way, and it contains a covenant by the mortgagors during the continuance of the security to take all their beer from the mortgagee, and a covenant by the mortgagee to supply it. It is contended that the covenant by the mortgagors is void in equity. The first objection I have to make is that it in no way affects the equity of redemption, for it is not stipulated that damages for breach of the covenant shall be covered by the security, and redemption takes place quite independently of the covenant; so this is not a case where the right to redeem is affected. Equity has always looked upon a mortgage as only a security for money, and here the right of the mortgagors to redeem on payment of principal, interest and costs is maintained. It has been contended that the principle is established by the authorities that a mortgagee shall not stipulate for any collateral advantage to himself. I think the cases only

establish that the mortgagee shall not impose on the mortgagor an unconscionable or oppressive bargain. The present appears to me to be a reasonable trade bargain between two business men who enter into it with their eyes open, and it would be a fanciful doctrine of equity that would set it aside.

It is unnecessary to say more: the covenant in this case is not avoided by any such supposed rule of equity as has been contended for.

COLLINS, L. J. I am of the same opinion. Apart from authority, no one would say that this stipulation was invalid, for it seems a reasonable and businesslike one. But it is said that mortgages are subject to a long series of decisions, and no doubt equity judges have tried to lay down some principle which would explain satisfactorily the decisions of their predecessors and account for their own, but in so doing they have sometimes laid down principles which, when applied to other cases, are too wide. The fact is that those decisions were given in particular hard cases, and judges have afterward endeavored, not always successfully, to reduce them to a general rule.

On what principle can any stipulation in a mortgage deed which does not fetter the right of redemption be held invalid? I think only on the general principle that effect will not be given to what is unconscientious and oppressive. No narrower principle will work. Here the provision is reasonable and does not fetter the equity of redemption. The wide proposition in *Jennings v. Ward*, 2 Vern. 520, was not necessary for the decision in that case, and there is nothing in this case to bring it within that decision. The mere fact that a stipulation for the benefit of the mortgagee is contained in the mortgage deed does not necessarily make that stipulation invalid.

SANTLEY v. WILDE, [1899] 2 Ch. 474.—The plaintiff, Miss Kate Santley, being the sub-lessee of the Royalty Theatre, and having an option to acquire the reversion of the head-lease on paying £2000 within a limited time, borrowed that sum of the defendant, S. J. Wilde, on the terms of the loan being repaid with six per cent. interest and secured by a legal mortgage, which was also to provide for payment to said Wilde of one-third of the clear net profit rental of the theatre. The mortgage, executed in pursuance of the agreement, was for the whole of the term acquired by the plaintiff, less

one day, and contained a covenant by her for repayment of the £2000 by twenty quarterly instalments of £100 each, and also a covenant to pay the one-third of the profit rental during the whole of the mortgagor's term, although the £2000 and interest should all have been paid. The property was redeemable only on the payment of £2000 and interest, and all other moneys covenanted to be paid. Some of the instalments being in arrears, defendant gave plaintiff three months' notice to pay off all the principal moneys and interest secured by the mortgage. Plaintiff paid the instalments in arrear, and within the three months tendered the balance of the £2000, with interest to the end of the three months and the costs, but Wilde refused to accept the money.

Plaintiff then brought the present action, claiming (1) a declaration that the mortgage ought to stand as a security for the £2000, or so much thereof as remained owing, with interest, and that so far as the same deed provided for payment to the defendant of a share of the rents and profits, or precluded the plaintiff from redeeming on payment of principal and interest, such deed was invalid and not binding on the plaintiff; (2) redemption and reconveyance.

The defendant counter-claimed for (1) a declaration that during the residue of the leasehold term, notwithstanding that all the principal and interest had been paid, he was entitled to be paid one-third of the clear net profit rental; (2) an account of what was due on the footing of that declaration.¹

LINDLEY, M. R. The question raised on this appeal is extremely important: I do not profess to be able to decide it on any principle which will be in harmony with all the cases; but it appears to me that the true principle running through them is not very difficult to discover, and I think that it can be applied so as to do justice in this case and in all other cases on the subject that may arise. The principle is this: a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage; and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion is the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption, and

¹ This statement of facts is abbreviated from the report of the case in the court below: [1899] 1 Ch. 747.

is therefore void. It follows from this, that "once a mortgage always a mortgage;" but I do not understand that this principle involves the further proposition that the amount or nature of the further debt or obligation the payment or performance of which is to be secured is a clog or fetter within the rule: see 1 Powell on Mortgages, 6th ed., pp. 116 *et seq.*: title, "How a Mortgage is considered in Equity." The right to redeem is not a personal right, but an equitable estate or interest in the property mortgaged. A "clog" or "fetter" is something which is inconsistent with the idea of "security": a clog or fetter is in the nature of a repugnant condition. If I convey land in fee subject to a condition forbidding alienation, that is a repugnant condition. If I give a mortgage on a condition that I shall not redeem, that is a repugnant condition. The Courts of Equity have fought for years to maintain the doctrine that a security is redeemable. But when and under what circumstances? On the performance of the obligation for which it was given. If the obligation is the payment of a debt, the security is redeemable on the payment of that debt. That, in my opinion, is the true principle applicable to the cases, and that is what is meant when it is said there must not be any clog or fetter on the equity of redemption. If so, this mortgage has no clog or fetter at all. Of course, the debt or obligation may be impeachable for fraud, oppression, or over-reaching: there the obligation is tainted to that extent and is invalid. But, putting such cases out of the question, when you get a security for a debt or obligation, that security can be redeemed the moment the debt or obligation is paid or performed, but on no other terms.¹

¹ "I take it that it is clearly established now, in the first place, that there is no such principle as is suggested, namely, that a mortgagee shall not stipulate for any collateral advantage for himself. He may so stipulate; and, if he does, he may obtain a collateral advantage: nothing can be said against it, and he can enforce it, always assuming that the bargain is not unconscionable or oppressive. In the second place, I take it also to be clear that there is now no such principle as is suggested, namely, that where a collateral advantage is stipulated for by

the mortgagee as a condition of the loan, that advantage or contract is to be presumed to have been given or made under pressure. There is no such presumption, but each case must be decided according to its own circumstances. The Court will look into the circumstances of each case and see whether the bargain come to is unconscionable or oppressive."—*Per* ROMER, L. J., in s. c. *id.* p. 478.

But *cf.* *Noakes & Co., Ltd., v. Rice*, [1902] A. C. 24; *Bradley v. Carritt*, [1903] A. C. 253.

**SAMUEL v. JARRAH TIMBER AND WOOD PAVING
CORPORATION, LIMITED**

HOUSE OF LORDS, 1904

(L. R. [1904] A. C. 323)

By letter dated June 11, 1901, the appellant Henry Samuel offered to advance to the respondent company 5000*l.* at 6 per cent. upon the security of 30,000*l.* first mortgage debenture stock of the company, subject to his having "the option to purchase the whole or any part of such stock at 40 per cent. at any time within twelve months." Other conditions were attached to the offer, but they are not material for the purpose of the present question. Then followed this provision: "The advance to become due and payable with interest at thirty days' notice on either side."

The offer was accepted by the company. The stock was duly created and registered in Mr. Samuel's name.

Within the period of twelve months, and before the company gave notice of intention to repay the advance, Mr. Samuel claimed to purchase the whole of the mortgaged stock at the agreed price. Thereupon the company brought this action, asking for redemption and a declaration that the option was illegal and void.

KEKEWICH, J., gave judgment for the company, declaring that the stipulation giving the appellant an option to purchase was void, and that the company was entitled to redeem and have the stock transferred on payment of whatever was due for principal, interest, and costs, with consequential relief. [1902] 2 Ch. 479. This decision was affirmed by the Court of Appeal (COLLINS, M. R., ROMER and COZENS-HARDY, L. JJ.). [1903] 2 Ch. 1.

EARL OF HALSBURY, L. C. (read by LORD MACNAGHTEN). My Lords, I regret that the state of the authorities leaves me no alternative other than to affirm the judgment of KEKEWICH, J., and the Court of Appeal. A perfectly fair bargain made between two parties to it, each of whom was quite sensible of what they were doing, is not to be performed because at the same time a mortgage arrangement was made between them. If a day had intervened between the two parts of the arrangement, the part of the bargain which the appellant claims to be performed would have been perfectly good and capable of being enforced; but a line of authori-

ties going back for more than a century has decided that such an arrangement as that which was here arrived at is contrary to a principle of equity, the sense of reason of which I am not able to appreciate, and very reluctantly I am compelled to acquiesce in the judgments appealed from.

LORD MACNAGHTEN. My Lords, both KEKEWICH, J., and the Court of Appeal decided in favour of the company. Having regard to the state of the authorities binding on the Court of Appeal if not on this House, it seems to me that they could not have come to any other conclusion, although the transaction was a fair bargain between men of business without any trace or suspicion of oppression, surprise, or circumvention.

It is, I think, unnecessary to consider what the true construction of the agreement between Mr. Samuel and the company may be. The result would have been precisely the same if the agreement had in terms declared that the option was not to continue after repayment. The law undoubtedly is that a condition such as that in question, if legal and binding at all, must come to an end on repayment of the loan.

In the Court of Appeal the question was treated as governed by the principle, of which *Noakes v. Rice*, [1902] A. C. 24, is a recent example, that on redemption the mortgagor is entitled to have the thing mortgaged restored to him unaffected by any condition or stipulation which formed part of the mortgage transaction.

That principle, I think, is perfectly sound. But, in my opinion, the question here depends rather upon the rule that a mortgagee is not allowed at the time of the loan to enter into a contract for the purchase of the mortgaged property.

This latter rule, I think, is founded on sentiment rather than on principle. It seems to have had its origin in the desire of the Court of Chancery to protect embarrassed landowners from imposition and oppression. And it was invented, I should suppose, in order to obviate the necessity of inquiry and investigation in cases where suspicion may be probable and proof difficult. I gather from some general observations made by LORD HARDWICKE in *Mellor v. Lees* (1742), 2 Atk. 494, that he would have been disposed to confine the rule to cases in which the Court finds or suspects "a design to wrest the estate fraudulently out of the hands of the mortgagor," and to cases of "common mortgage"—that is, as I understand it, mortgage of land by deed. It will be observed that in the later case of *Toomes v. Conset* (1745), 3 Atk. 261, which is often

referred to for a statement of the rule, his Lordship speaks only of "a deed of mortgage"; an instrument which perhaps rather lends itself to imposition—for no one, I am sure, by the light of nature ever understood an English mortgage of real estate.

In *Vernon v. Bethell* (1761), 2 Eden, 113, however, NORTHINGTON L. C. (then LORD HENLEY), laid down the law broadly in the following terms: "This Court, as a Court of conscience, is very jealous of persons taking securities for a loan and converting such securities into purchases. And therefore I take it to be an established rule that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged and the conveyance absolute. And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but to answer a present exigency will submit to any terms that the crafty may impose upon them."

This doctrine, described by Lord Henley as an established rule nearly 150 years ago, has never, so far as I can discover, been departed from since or questioned in any reported case. It is, I believe, universally accepted by text-writers of authority. Speaking for myself, I should not be sorry if your Lordships could see your way to modify it so as to prevent its being used as a means of evading a fair bargain come to between persons dealing at arms' length and negotiating on equal terms. The directors of a trading company in search of financial assistance are certainly in a very different position from that of an impecunious landowner in the toils of a crafty money-lender. At the same time I quite feel the difficulty of interfering with any rule that has prevailed so long, and I am not prepared to differ from the conclusion at which the Court of Appeal has arrived.

I am therefore of opinion that the appeal must be dismissed with costs, and I move your Lordships accordingly.

LORD LINDLEY. My Lords, the letter of June 11, 1901, written by the defendant to the plaintiff company, contained an offer of a loan of 5000*l.* to the company upon certain terms, and this offer and the terms proposed were accepted by the company by their letter in answer, dated June 14, 1901. These two letters constituted an agreement between the parties. The main provisions are as follows, namely: 1. That the defendant should forthwith lend the company 5000*l.* at 6 per cent., redeemable on thirty days' no-

tice by either party. 2. That the defendant should have as security 30,000*l.* of the company's first mortgage debenture stock transferred to him. 3. That the directors of the company should elect a nominee of his on their board. 4. That the defendant should have the option of purchasing the whole or any part of such stock at 40 per cent. at any time within twelve months. 5. That he should have a further option, namely, in the event of the company at any time raising further capital or selling its undertaking for shares or stocks of another company, the defendant should have the option of underwriting the taking up of such new capital, or shares, or stocks at a commission of 10 per cent.

The first question is, What is the true nature of this agreement? Is it a mortgage with an option to purchase, or is it a conditional sale? Or is it an agreement giving Samuel an option to hold the debenture stock as a mortgage or a purchase? It appears to me to be clearly a mortgage with an option to purchase. A loan of 5000*l.* on security was what the company wanted, and what Samuel agreed to let the company have on terms. They were not bargaining for anything else. As soon as the 5000*l.* was advanced and the debenture stock was placed at Samuel's disposal he was in the position of mortgagee of that stock. He had the rights of a mortgagee, and the company had the rights of a mortgagor. There was that reciprocity and mutuality of remedies which distinguish a mortgage transaction from a conditional sale and from other transactions more or less resembling a mortgage, but not really constituting a mortgage. The transaction was in my opinion a mortgage, plus, amongst other things, an option to purchase, which if exercised by the mortgagee would put an end to the mortgagor's right to redeem—i. e., would prevent him from getting back his mortgaged property. This was the view taken by KEKEWICH, J., and by all the members of the Court of Appeal, and I am unable myself to view the transaction differently.

In *Lisle v. Reeve*, [1902] 1 Ch. 53, at p. 68, BUCKLEY, J., suggested some instances in which he considered a mortgagee might validly stipulate for an option to buy the equity of redemption; but although his decision was affirmed first by the Court of Appeal and afterwards by this House (*Reeve v. Lisle*, [1902] A. C. 461), the affirmance proceeded entirely on the fact that the agreement to buy the equity of redemption was no part of the original mortgage transaction, but was entered into subsequently, and was an entirely separate transaction to which no objection could be taken.

It is plain that the decision would not have been affirmed if the agreement to buy the equity of redemption had been one of the terms of the original mortgage. 2 W. & T., 7th ed., p. 16. The Irish case *Re Edward's Estate*, (1861), 11 Ir. Ch. Rep. 367, is to the same effect.

I cannot help thinking that both parties intended that the two options to purchase the 30,000*l.* debenture stock and to underwrite further capital or debenture stock if issued were to be exercisable even after payment off of the 5000*l.* But the decisions of this House in *Noakes v. Rice*, [1902] A. C. 24, and *Bradley v. Carritt*, [1903] A. C. 253, conclusively shew that, whatever might have been intended, Samuel could not have been entitled to exercise either option after repayment of his loan. But these decisions and the previous decision of *Salt v. Northampton*, [1892] A. C. 1, emphatically recognize the old doctrine, "Once a mortgage always a mortgage," which is too well settled to be open to controversy. Lord Hardwicke said in *Toomes v. Conset*, 3 Atk. 261: "This Court will not suffer in a deed of mortgage any agreement in it to prevail that the estate become an absolute purchase in the mortgagee upon any event whatsoever." But the doctrine is not confined to deeds creating legal mortgages. It applies to all mortgage transactions. The doctrine "Once a mortgage always a mortgage" means that no contract between a mortgagor and a mortgagee made at the time of the mortgage and as part of the mortgage transaction, or, in other words, as one of the terms of the loan, can be valid if it prevents the mortgagor from getting back his property on paying off what is due on his security. Any bargain which has that effect is invalid, and is inconsistent with the transaction being a mortgage. This principle is fatal to the appellant's contention if the transaction under consideration is a mortgage transaction, as I am of opinion it clearly is.

Then it was contended that, as the property mortgaged was debenture stock issued by a limited company, the case did not fall within the principle to which I have been referring. I confess my inability to follow the argument on this point. Debenture stock is usually a sum of money charged on the assets of the company issuing it. It may be redeemable or irredeemable, in which case it is not a mortgage at all. But whether redeemable or irredeemable, it is capable of being made a security for money lent upon it. It can be mortgaged as well by the company which issues it as by an ordinary holder. I can discover no reason for treating a mortgage of debenture stock as something so different from other mort-

gages as to render the principle "Once a mortgage always a mortgage" inapplicable to it.

In my opinion the appeal ought to be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.¹

FAIRCLOUGH v. SWAN BREWERY CO., LTD.

PRIVY COUNCIL, ON APPEAL FROM THE SUPREME COURT OF
WESTERN AUSTRALIA, 1912

(L. R. [1912] A. C. 565)

APPEAL from an order of the Full Court varying a judgment of McMillan, J.

The question submitted was whether a clause set out in their Lordships' judgment in a mortgage deed by the lessee of an hotel to a brewery company precluding the lessee from redeeming his mortgage for the whole of the residue of the term for which the mortgagor held the hotel less a few weeks, being a period of more than seventeen years, and precluding him from purchasing beer, during the continuance of the security, from any person other than the mortgagees, were void as being a clog on the equity of redemption and in restraint of trade.

The appellant bought the hotel in December, 1907, from a vendor who held the same under a lease for twenty years from June 12, 1905, at a yearly rent of 520*l.* subject to a mortgage to the respondents on which 1500*l.* was due. The respondents refused to be paid off, insisting that 500*l.* should remain to cover the tied covenant upon the hotel which the vendor had given. The appellant on December 27, 1907, executed a mortgage for 500*l.* which contained the said clause; and accordingly the respondents refused to allow him to redeem except by the monthly instalments fixed by the mortgage deed.

On June 23, 1910, the respondents sued to recover damages for the appellant's breach of his covenant in the said mortgage deed to purchase from them ale, beer, and stout, an account of the ale, beer, and stout purchased by the appellant in breach of the said covenant, and an injunction to restrain him from committing any further breach thereof.

¹ Cf. *De Beers Consolidated Mines, Ltd., v. British South Africa Co.* [1912], A. C. 52, reversing [1910] 2 Ch. 502.

The appellant pleaded that the covenant was an unreasonable and unnecessary restraint of trade, was contrary to public policy and illegal, and was only binding during the continuance of the security created by the mortgage deed, and that the appellant ought to be allowed to redeem the said mortgage as he had already offered to do, and that the said covenant was a clog on the appellant's equity of redemption of the mortgaged premises and was null and unenforceable; and the appellant counterclaimed against the respondents for damages for the breach of covenant by the respondents to supply him with the ale, beer, and stout required by him, and for declaration that the covenant sued on by the respondents was invalid, and that the stipulations for continuance of the security were void, and for redemption of the mortgaged premises on payment of principal, interest, and costs.

MCMILLAN, J., found that the provisions in the mortgage deed which prevented the appellant from redeeming for seventeen and a half years were for the benefit of the respondents, and he held that they were void as being an unreasonable clog on the appellant's equity of redemption. He held that the appellant was entitled to redeem, and refused the injunction sought, holding that there was no breach after redemption had been refused.

The Full Court in appeal agreed with MCMILLAN, J., in his finding that the postponement of the period of redemption was for the benefit of the respondents in order to make sure that the hotel would remain a tied house, but held that the provisions in the mortgage deed preventing the appellant from redeeming the mortgage were not unreasonable. They accordingly rescinded the order declaring the appellant entitled to redeem and ordered that the appellant should be restrained during the continuance of the mortgage from any further breach of his covenant and that the respondents should recover damages for breaches already committed.

LORD MACNAGHTEN. James Fairclough, a publican, the appellant in this case, became the registered proprietor of a lease of the Federal Hotel, Katanning, for the residue of a term of twenty years from June 12, 1905.

By an instrument of mortgage dated December 27, 1907, the appellant, therein called "the mortgagor," in consideration of the sum of 500*l.* lent to him by the respondent company, and in consideration of all moneys which might thereafter become owing by the mortgagor to the company for goods supplied, or for money

lent or advanced, or on any other account whatever, did thereby for himself, his heirs, executors, administrators, and transferees, covenant with the company as follows: "That the mortgagor will pay to the company the said principal sum of 500l. by 209 successive monthly instalments as follows, that is to say, 208 instalments of 2l. 8s. each, and one final instalment of 16s., the first of such monthly instalments of 2l. 8s. to be paid on the 1st day of every succeeding month thereafter until the whole of the said principal sum of 500l. shall be paid off, provided always that the mortgagor shall not be at liberty to pay off the said principal sum except by the instalments, and at the times aforesaid, without the express consent in writing of the company on each occasion first had and obtained."

Then followed a covenant for payment of interest on the amount from time to time remaining unpaid, at the rate of 7 per cent. per annum on the first day of every calendar month, and other covenants including a covenant stipulating in effect that during the continuance of the security the Federal Hotel should be a tied house in favour of the company. For better securing the payment in manner aforesaid of the said principal sum and interest, and all other moneys intended to be thereby secured, the mortgagor thereby mortgaged all his estate and interest in the Federal Hotel to the company.

It will be observed that the lease is made to expire on June 12, 1925, and that the instrument of mortgage provides that without the consent in writing of the company the mortgage debt of 500l. is not to be wholly paid off until May 1, 1925, that is just six weeks before the actual expiration of the lease.

In December, 1909, the company were prevented by accidental circumstances from supplying the appellant with beer in accordance with a covenant on their part contained in the mortgage deed. The appellant thereupon assumed to treat the tie as at an end, and obtained beer from other quarters. The company brought an action for damages and for an injunction. The appellant, who apparently had already offered to redeem, counterclaimed for redemption. McMILLAN, J., gave judgment for the company in the action, and assessed the damages at 8l. On the counterclaim he gave judgment for the appellant, holding that by law he was entitled to redeem. On appeal to the Full Court an order was made in the action in favour of the company with a reference as to damages. The counterclaim was dismissed with costs. Hence the present appeal.

The arguments of counsel ranged over a very wide field. But the real point is a narrow one. It depends upon a doctrine of equity, which is not open to question.

"There is," as KINDERSLEY, V. C., said in *Gossip v. Wright* (1863), 32 (Ch.) 648, 653, "no doubt that the broad rule is this: that the Court will not allow the right of redemption in any way to be hampered or crippled in that which the parties intended to be a security either by any contemporaneous instrument with the deed in question, or by anything which this Court would regard as a simultaneous arrangement or part of the same transaction." The rule in comparatively recent times was unsettled by certain decisions in the Court of Chancery in England which seem to have misled the learned judges in the Full Court. But it is now firmly established by the House of Lords that the old rule still prevails and that equity will not permit any device or contrivance being part of the mortgage transaction or contemporaneous with it to prevent or impede redemption. The Learned counsel on behalf of the respondents admitted, as he was bound to admit, that a mortgage cannot be made irredeemable. That is plainly forbidden. Is there any difference between forbidding redemption and permitting it, if the permission be a mere pretence? Here the provision for redemption is nugatory. The incumbrance on the lease the subject of the mortgage according to the letter of the bargain falls to be discharged before the lease terminates, but at a time when it is on the very point of expiring, when redemption can be of no advantage to the mortgagor even if he should be so fortunate as to get his deeds back before the actual termination of the lease. For all practical purposes this mortgage is irredeemable. It was obviously meant to be irredeemable. It was made irredeemable in and by the mortgage itself.

Their Lordships are therefore of opinion that the order of the Full Court should be discharged with costs, and the decision of McMILLAN, J., restored. Their Lordships will humbly advise His Majesty accordingly.

The respondent company will pay the costs of this appeal.

KREGLINGER v. NEW PATAGONIA MEAT AND COLD STORAGE COMPANY, LTD.

HOUSE OF LORDS, 1913

(L. R. [1914] A. C. 25)

APPEAL from an order of the Court of Appeal affirming an order of SWINFEN EADY, J.¹

VISCOUNT HALDANE, L. C. My Lords, the appellants are a firm of merchants and woolbrokers. The respondents carry on the business of preserving and canning meat and of boiling down the carcasses of sheep and other animals. In the course of this business they have at their disposal a large number of sheepskins. It appears that in the summer of 1910 the respondents were desirous of borrowing 10,000*l.*, and requested the appellants to advance that sum. The appellants, who were desirous of obtaining an option to purchase for a term of five years all the sheepskins at the respondents' disposal, agreed to lend the money in consideration of being given such an option. The negotiations which followed resulted in an agreement dated August 24, 1910. Under this agreement the appellants were to lend the respondents the sum of 10,000*l.* repayable on demand with interest at 6 per cent. If, however, among other conditions to be observed, the interest was duly paid, the appellants were not to demand repayment till September 30, 1915, but the respondents were to be at liberty to pay off the loan earlier. To secure the loan the respondents by the agreement charged their undertaking and all their property, both present and future, with the payment of the principal sum and interest to the intent that the charge should be a floating security on the undertaking and property, but so that the respondents should not create any mortgage or charge in priority without the appellants' consent, or without such consent sell their farms or lands. The principal sum was to be made payable in certain prescribed events. By clause 8 of the agreement the respondents were not for five years from the date of the agreement (i. e., till August 24, 1915) to sell sheepskins to any one excepting the appellants, so long as the latter were willing to buy at a price equal to the best

¹ Statement abridged. Concurring opinions of the EARL OF HALSBURY and of LORDS ATKINSON and MERSEY omitted. Portions of the opinions of VISCOUNT HALDANE, L. C., and of LORD PARKER are omitted.

price (c. i. f. London) offered by any one else, and the respondents were to pay to the appellants a commission of 1 per cent. on the sale price of all sheepskins sold by the respondents to any one else.

My Lords, the respondents have now, as they were entitled to do under the agreement, paid off the loan. They claim that such payment has put an end to the option of the appellants to buy the respondents' sheepskins. Under the terms of the agreement this option, as I have already stated, will, if it is valid, continue operative until August 24, 1915. What the respondents say is that the stipulation is one that restricts their freedom in conducting the undertaking or business which is the subject of the floating charge; that it was consequently of the nature of a clog on their right to redeem and invalid; and that, whether it clogged the right to redeem or was in the nature of a collateral advantage, it was not intended and could not be made to endure after redemption. The appellants, on the other hand, say that the stipulation in question was one of a kind usual in business, and that it was in the nature not of a clog but of a collateral bargain outside the actual loan, which they only agreed to make in order to obtain the option itself. They further say that even if the option could be regarded as within the doctrine of equity which forbids the clogging of the right to redeem, that doctrine does not in a case as this extend to a floating charge.

The controversy which has thus arisen was brought before Swinfen Eady, J., on a motion for an interlocutory injunction to restrain the respondents from selling sheepskins to any one else than the appellants. The learned judge refused this motion on the ground that the point had been settled adversely to the appellants by decisions of your Lordships' House. The case was brought formally before the Court of Appeal, but was disposed of there without argument with a view to taking the point as speedily as possible before your Lordships for review.

My Lords, before I refer to the decisions of this House which the Courts below have considered to cover the case, I will state what I conceive to be the broad principles which must govern it.

The reason for which a Court of Equity will set aside the legal title of a mortgagee and compel him to reconvey the land on being paid principal, interest, and costs is a very old one. It appears to owe its origin to the influence of the Church in the Courts of the early Chancellors. As early as the Council of Lateran in 1179, we find, according to Matthew Paris (*Historia Major*, 1684 ed. at pp. 114-115), that famous assembly of ecclesiastics condemning usur-

ers and laying down that when a creditor had been paid his debt he should restore his pledge. It was therefore not surprising that the Court of Chancery should at an early date have begun to exercise jurisdiction in personam over mortgagees. This jurisdiction was merely a special application of a more general power to relieve against penalties and to mould them into mere securities. The case of the common law mortgage of land was indeed a gross one. The land was conveyed to the creditor upon the condition that if the money he had advanced to the feoffor was repaid on a date and at a place named, the fee simple should revert in the latter, but that if the condition was not strictly and literally fulfilled he should lose the land forever. What made the hardship on the debtor a glaring one was that the debt still remained unpaid and could be recovered from the feoffor notwithstanding that he had actually forfeited the land to his mortgagee. Equity, therefore, at an early date began to relieve against what was virtually a penalty by compelling the creditor to use his legal title as a mere security.

My Lords, this was the origin of the jurisdiction which we are *now considering*, and it is important to bear that origin in mind. *For the end to accomplish which the jurisdiction has been evolved ought to govern and limit its exercise by equity judges.* That end has always been to ascertain, by parol evidence if need be, the real nature and substance of the transaction, and if turned out to be in truth one of mortgage simply, to place it on that footing. It was, in ordinary cases, only where there was conduct which the Court of Chancery regarded as unconscientious that it interfered with freedom of contract. The lending of money, on mortgage or otherwise, was looked on with suspicion, and the Court was on the alert to discover want of conscience in the terms imposed by lenders. But whatever else may have been the intention of those judges who laid the foundation of the modern doctrines with which we are concerned in this appeal, they certainly do not appear to have contemplated that their principle should develop consequences which would go far beyond the necessities of the case with which they were dealing and interfere with transactions which were not really of the nature of a mortgage, and which were free from objection on moral grounds. Moreover, the principle on which the Court of Chancery interfered with contracts of the class under consideration was not a rigid one. The equity judges looked, not at what was technically the form, but at what was really the substance of transactions, and confined the application of their rules

V { to cases in which they thought that in its substance the transaction was oppressive. Thus in *Howard v. Harris* (1681), 1 Vern. 33; 2 Ch. Cas. 147, LORD KEEPER NORTH in 1683 set aside an agreement that a mortgage should be irredeemable after the death of the mortgagor and failure of the heirs of his body, on the ground that such a restriction on the right to redeem was void in equity. But he went on to intimate that if the money had been borrowed by the mortgagor from his brother, and the former had agreed that if he had no issue the land should become irredeemable, equity would not have interfered with what would really have been a family arrangement. The exception thus made to the rule, in cases where the transaction includes a family arrangement as well as a mortgage, has been recognized in later authorities.

{ The principle was thus in early days limited in its application to the accomplishment of the end which was held to justify interference of equity with freedom of contract. It did not go further. As established it was expressed in three ways. The most general of these was that if the transaction was once found to be a mortgage, it must be treated as always remaining a mortgage and nothing but a mortgage. That the substance of the transaction must be looked to in applying this doctrine and that it did not apply to cases which were only apparently or technically within it but were in reality something more than cases of mortgage, *Howard v. Harris* (1681), 1 Vern. 33; 2 Ch. Cas. 147, and other authorities shew. It was only a different application of the paramount doctrine to lay it down in the form of a second rule that a mortgagee should not stipulate for a collateral advantage which would make his remuneration for the loan exceed a proper rate of interest. The legislature during a long period placed restrictions on the rate of interest which could legally be exacted. But equity went beyond the limits of the statutes which limited the interest, and was ready to interfere with any usurious stipulation in a mortgage. In so doing it was influenced by the public policy of the time. That policy has now changed, and the Acts which limited the rate of interest have been repealed. The result is that a collateral advantage may now be stipulated for by the mortgagee provided that he has not acted unfairly or oppressively, and provided that the bargain does not conflict with the third form of the principle. This is that a mortgage (subject to the apparent exception in the case of family arrangements to which I have already alluded) cannot be made irredeemable, and that any stipulation which restricts or clogs the equity of redemption is void. It is obvious that

the reason for the doctrine in this form is the same as that which gave rise to the other forms. It is simply an assertion in a different way of the principle that once a mortgage always a mortgage and nothing else.

My Lords, the rules I have stated have now been applied by Courts of Equity for nearly three centuries, and the books are full of illustrations of their application. But what I have pointed out shews that it is inconsistent with the objects for which they were established that these rules should crystallize into technical language so rigid that the letter can defeat the underlying spirit and purpose. Their application must correspond with the practical necessities of the time. The rule as to collateral advantages, for example, has been much modified by the repeal of the usury laws and by the recognition of modern varieties of commercial bargaining. In *Biggs v. Hoddinott*, [1898] 2 Ch. 307, it was held that a brewer might stipulate in a mortgage made to him of an hotel that during the five years for which the loan was to continue the mortgagors would deal with him exclusively for malt liquor. In the seventeenth and eighteenth centuries a Court of Equity could hardly have so decided, and the judgment illustrates the elastic character of equity jurisdiction and the power of equity judges to mould the rules which they apply in accordance with the exigencies of the time. The decision proceeded on the ground that a mortgagee may stipulate for a collateral advantage at the time and as a term of the advance, provided, first, that no unfairness is shewn, and, secondly, that the right to redeem is not thereby clogged. It is no longer true that, as was said in *Jennings v. Ward*, 2 Vern. 520, "a man shall not have interest for his money and a collateral advantage besides for the loan of it." Unless such a bargain is unconscionable it is now good. But none the less the other and wider principle remains unshaken, that it is the essence of a mortgage that in the eye of a Court of Equity it should be a mere security for money, and that no bargain can be validly made which will prevent the mortgagor from redeeming on payment of what is due, including principal, interest, and costs. He may stipulate that he will not pay off his debt, and so redeem the mortgage, for a fixed period. But whenever a right to redeem arises out of the doctrine of equity, he is precluded from fettering it. This principle has become an integral part of our system of jurisprudence and must be faithfully adhered to.

My Lords, the question in the present case is whether the right to redeem has been interfered with. And this must, for the reasons

to which I have adverted in considering the history of the doctrine of equity, depend on the answer to a question which is primarily one of fact. What was the true character of the transaction? Did the appellants make a bargain such that the right to redeem was cut down, or did they simply stipulate for a collateral undertaking, outside and clear of the mortgage, which would give them an exclusive option of purchase of the sheepskins of the respondents? The question is in my opinion not whether the two contracts were made at the same moment and evidenced by the same instrument, but whether they were in substance a single and undivided contract or two distinct contracts. Putting aside for the moment considerations turning on the character of the floating charge, such an option no doubt affects the freedom of the respondents in carrying on their business even after the mortgage has been paid off. But so might other arrangements which would be plainly collateral, an agreement, for example, to take permanently into the firm a new partner as a condition of obtaining fresh capital in the form of a loan. The question is one not of form but of substance, and it can be answered in each case only by looking at all the circumstances, and not by mere reliance on some abstract principle, or upon the dicta which have fallen obiter from judges in other and different cases. Some, at least, of the authorities on the subject disclose an embarrassment which has, in my opinion, arisen from neglect to bear this in mind. In applying a principle the ambit and validity of which depend on confining it steadily to the end for which it was established, the analogies of previous instances where it has been applied are apt to be misleading. For each case forms a real precedent only in so far as it affirms a principle, the relevancy of which in other cases turns on the true character of the particular transaction, and to that extent on circumstances.

My Lords, if in the case before the House your Lordships arrive at the conclusion that the agreement for an option to purchase the respondents' sheepskins was not in substance a fetter on the exercise of their right to redeem, but was in the nature of a collateral bargain the entering into which was a preliminary and separable condition of the loan, the decided cases cease to present any great difficulty. In questions of this kind the binding force of previous decisions, unless the facts are indistinguishable, depends on whether they establish a principle.

What is vital in the appeal now under consideration is to classify accurately the transaction between the parties. What we have to do is to ascertain from scrutiny of the circumstances whether there

has really been an attempt to effect a mortgage with a provision preventing redemption of what was pledged merely as security for payment of the amount of the debt and any charges besides that may legitimately be added. It is not, in my opinion, conclusive in favour of the appellants that the security assumed the form of a floating charge. A floating charge is not the less a pledge because of its floating character, and a contract which fetters the right to redeem on which equity insists as regards all contracts of loan and security ought on principle to be set aside as readily in the case of a floating security as in any other case. But it is material that such a floating charge, in the absence of bargain to the contrary effect, permits the assets to be dealt with freely by the mortgagor until the charge becomes enforceable. If it be said that the undertaking of the respondents which was charged extended to their entire business, including the right to dispose of the skins of which they might from time to time become possessed, the comment is that at least they were to be free, so long as the security remained a floating one, to make contracts in the ordinary course of business in regard to these skins. If there had been no mortgage such a contract as the one in question would have been an ordinary incident in such a business. We are considering the simple question of what is the effect on the right to redeem of having inserted into the formal instrument signed when the money was borrowed an ordinary commercial contract for the sale of skins extending over a period. It appears that it was the intention of the parties that the grant of the security should not affect the power to enter into such a contract either with strangers or with the appellants, and if so I am unable to see how the equity of redemption is affected. No doubt it is the fact that on redemption the respondents will not get back their business as free from obligation as it was before the date of the security. But that may well be because outside the security and consistently with its terms there was a contemporaneous but collateral contract, contained in the same document as constituted the security, but in substance independent of it. If it was the intention of the parties, as I think it was, to enter into this contract as a condition of the respondents getting their advance, I know no reason either in morals or in equity which ought to prevent this intention from being left to have its effect. What was to be capable of redemption was an undertaking which was deliberately left to be freely changed in its details by ordinary business transactions with which the mortgage was not to interfere. Had the charge not been a floating one it might have been more

difficult to give effect to this intention. In *Noakes & Co. v. Rice*, [1902] A. C. 24, this difficulty is illustrated, for the House held that what had been inserted in the shape of a covenant by the mortgagor to buy the beer of the mortgagee after redemption of the public-house mortgaged was really a term of the mortgage and was inoperative as being, not merely a collateral agreement, but in truth a restriction on the right to get back the security free from the terms of the mortgage. That was the case of the mortgage of a specific property. The decision that the transaction was what it was held to be is at all events readily intelligible. In *Bradley v. Carrith*, [1903] A. C. 253, it was decided that the mortgagor of shares in a tea company who had covenanted that he would use his best endeavours to secure that always thereafter the mortgagee should have the sale of the company's tea had permanently fettered himself in the free disposition and enjoyment of the shares. It was held that though the covenant did not operate in rem on the shares it amounted to a device or contrivance designed to impede redemption. The decision was a striking one. It was not unanimous, for LORD LINDLEY dissented from the conclusions of LORD MACNAGHTEN and LORD DAVEY. It is binding on your Lordships in any case in which the transaction is really of the same kind, although it does not follow that all the dicta in the judgment of those of your Lordships' House who were in a majority must be taken as of binding authority. And it certainly cannot, in my opinion, be taken as authoritatively laying down that the mere circumstance that after redemption the property redeemed may not, as the result of some bargain made at the time of the mortgage, be in the same condition as it was before that time, is conclusive against the validity of that bargain. To render it invalid the bargain must, when its substance is examined, turn out to have formed part of the terms of the mortgage and to have really cut down a true right of redemption. I think that the tendency of recent decisions has been to lay undue stress on the letter of the principle which limits the jurisdiction of equity in setting aside contracts. The origin and reason of the principle ought, as I have already said, to be kept steadily in view in applying it to fresh cases. There appears to me to have grown up a tendency to look to the letter rather than to the spirit of the doctrine. The true view, is, I think, that judges ought in this kind of jurisdiction to proceed cautiously, and to bear in mind the real reasons which have led Courts of Equity to insist on the free right to redeem and the limits within which the purpose of the rule ought to confine its

scope. I cannot but think that the validity of the bargain in such cases as *Bradley v. Carritt*, [1903] A. C. 253, and *Santley v. Wilde*, [1899] 2 Ch. 474, might have been made free from serious question if the parties had chosen to seek what would have been substantially the same result in a different form. For form may be very important when the question is one of the construction of ambiguous words in which people have expressed their intentions. I will add that, if I am right in the view which I take of the authorities, there is no reason for thinking that they establish another rule suggested by the learned counsel for the respondents, that even a mere collateral advantage stipulated for in the same instrument as constitutes the mortgage cannot endure after redemption. The dicta on which he relied are really illustrations of the other principles to which I have referred.

The result of the consideration I have given to this appeal is that I think that the contention of the appellants is right. That they should succeed on a point which was little if at all considered in the Courts below is presumably due to the question raised having been thought to be covered by authority. That does not affect the appellants' right to argue the real point here. The parties have apparently agreed that the result of the motion should be considered as disposing of the action, and that if on the point which has been argued the decision is for the appellants they should be declared to be entitled to the injunction asked for. I think that the simplest way of giving effect to this agreement on the footing that the appeal is to be decided in the appellants' favour will be to declare them entitled to an injunction in terms of the notice of motion and to the costs here and in the Court of Appeal, with the liberty to apply to the Chancery Division to dispose of the action. I move accordingly.

LORD PARKER OF WADDINGTON. My Lords, the defendants in this case are appealing to the equitable jurisdiction of the Court for relief from a contract which they admit to be fair and reasonable and of which they have already enjoyed the full advantage. Their title to relief is based on some equity which they say is inherent in all transactions in the nature of a mortgage. They can state no intelligible principle underlying this alleged equity, but contend that your Lordships are bound by authority. That the Court should be asked in the exercise of its equitable jurisdiction to assist in so inequitable a proceeding as the repudiation of a fair and reasonable bargain is somewhat startling. . . .

My Lords, I desire, in connection with what I have just said, to add a few words on the maxims in which attempts have been made to sum up the equitable principles applicable to mortgage transactions. I refer to the maxims, "Once a mortgage, always a mortgage," or "A mortgage cannot be made irredeemable." Such maxims, however convenient, afford little assistance where the Court has to deal with a new or doubtful case.

My Lords, after the most careful consideration of the authorities I think it is open to this House to hold, and I invite your Lordships to hold, that there is now no rule in equity which precludes a mortgagee, whether the mortgage be made upon the occasion of a loan or otherwise, from stipulating for any collateral advantage, provided such collateral advantage is not either (1) unfair and unconscionable, or (2) in the nature of a penalty clogging the equity of redemption, or (3) inconsistent with or repugnant to the contractual and equitable right to redeem.

Order of the Court of Appeal reversed, and declare that the appellants are entitled to an injunction in the terms of the notice of motion with liberty to apply to the Chancery Division to dispose of the action.

THOLEN *v.* DUFFY, 7 Kans. 405 (1871). BREWER, J. The stipulation in the mortgage in regard to attorney's fees is in these words: "And the said parties of the first part hereby agree that ten per cent. upon the amount due on said note at time of any judgment thereon shall be added to the same and judgment rendered therefor for attorney's fees for collection and services." The learned judge who tried the case charged the jury that this stipulation was valid, and that they might add to the amount found due upon the note ten per cent. therefore, and bring in a verdict for such sum. The verdict they returned really included only between six and seven per cent. for attorney's fees. Stipulations like this have been sustained by the decisions of many courts, and properly so (7 Watts, 126; 51 Penn. St. 78; 3 Wis. 454; 10 Wis. 41; 12 Wis. 179, 452; 15 Wis. 522; 16 Wis. 672; 8 Blackf. 140; 1 Nev. 161; 2 Nev. 199; 21 La. An. 607).

It does not violate the usury law, because it is no stipulation to pay for the use of the money borrowed, but only an agreement to compensate the mortgagee for the expenses of compelling the mortgagor to perform his contract. If the mortgagor pay the money borrowed at the time it becomes due, as he has promised to do, he incurs no loss by reason of this clause in the mortgage. He is

wholly released by the payment of the money borrowed and the stipulated interest. Where by the term of a contract a party can discharge himself by paying the real amount due, the transaction is not usurious (Bac. Abr., title, Usury, 6; *Billingsley v. Dean*, 11 Ind. 331; *Lawrence v. Cowlee*, 13 Ill. 577; *Gould v. The Bishop Hill Co.*, 35 Ill. 325). Nor is it against public policy that the expense of a litigation should be borne by the party whose breach of his contract necessitates such litigation. On the contrary, it accords fully with the soundest principles. Our statutes, as well as those of nearly, if not quite, all of the States, provide that the costs—using the term in the limited sense as embracing the amounts due the sheriff, the clerk, and other officers of the court, for their services in the case—shall be paid by the losing party. The theory is that the determination of the suit has shown that his wrong caused the litigation, and, therefore, he should bear the expense. And in many States the court is authorized to award to the successful party, in addition to the amount found due and the court expenses, certain sums for his attorney's costs. Our statutes do not provide for this additional allowance. But this omission to provide for such compensation in all cases is no argument against the right of the parties to contract for it in some.¹

¹ This represents the prevailing view in the United States. *Pierce v. Kneeland*, 16 Wis. 672 (1863); *Weatherby v. Smith*, 30 Iowa, 131 (1870). See, also, *Foote v. Sprague*, 13 Kans. 155 (1874).

"In the case now before us it is agreed in express terms by the mortgagor, in case of default in payment, that the attorney's fee shall be paid as a part of the costs of collecting the sum of money secured by the mortgage. The agreement to pay such fees is a part of the security itself, and no reason is perceived why the costs incident to the collec-

tion of the sum of money secured by the mortgage should not be made a part of the judgment or decree in case the mortgage had to be foreclosed."—*Per* SCOTT, J., in *Clawson v. Munson*, 55 Ill. 394 (1870). And see *Barton v. Farmers' National Bank*, 122 Ill. 352 (1887).

In a few States, however, such stipulations are regarded as usurious and oppressive. *Thomasson v. Townsend*, 10 Bush (Ky.), 114 (1873); *Myer v. Hart*, 40 Mich. 517 (1879); *Kittermaster v. Brossard*, 105 Mich. 219 (1895).

DALY v. MAITLAND

SUPREME COURT OF PENNSYLVANIA, 1879

(88 Pa. St. 384)

Scire facias sur mortgage by Henry Maitland against Henry M. Daly and others, executors of John Daly, deceased.

The mortgage was for \$14,000, dated May 6th, 1871, for five years, between John Daly and Henry Maitland. John Daly having died before the commencement of the suit, the writ was issued against the executors and trustees under his will after the maturity of the mortgage.

The pleas were *nil debet* and payment.

The mortgage contained the following clause, "and provided also that it shall and may be lawful to and for the said Henry Maitland, his heirs, executors, administrators, and assigns, when and as soon as the principal sum hereby secured shall become due . . . to sue out forthwith a *scire facias* upon this indenture of mortgage and to proceed therein to judgment and execution for the recovery of the whole of the said principal debt and all interest and taxes due thereon, together with an attorney's commission for collection, viz.: five per cent., besides costs of suit, without any stay, any law or usage to the contrary notwithstanding."

On the trial, after the offer of the mortgage in evidence, the defendants admitted plaintiff's claim for the principal of the mortgage and interest, but resisted his claim for five per cent. commission on the principal of the mortgage.

The defendants submitted the following points, which the court, MITCHELL, J., refused:

1. That the plaintiff is entitled to recover upon the mortgage above the amount of the mortgage and interest, a reasonable attorney fee for the collection of the mortgage, and what is a reasonable fee must be proved by plaintiff to recover it.

2. That the plaintiff is entitled to recover under the mortgage sued on only a reasonable attorney fee in addition to the amount of the mortgage and interest.

The court charged as follows:

"The plaintiff is entitled to recover the full amount of his debt covenanted in the mortgage to be paid, including the five per cent. upon the amount of the mortgage debt for collection, that being

expressly stipulated for in the mortgage to be paid on a contingency, which is admitted to have happened."

The verdict was for \$14,862.40, which included interest and the five per cent. commission. After judgment the defendants took this writ and assigned for error the refusal of the foregoing points and the portion of the charge noted.

CHIEF JUSTICE SHARSWOOD delivered the opinion of the court March 17th, 1879.

In *Huling v. Drexel*, 7 Watts, 126, it was decided by this court that a stipulation in a mortgage that, in the event of the necessity of proceeding to recover the mortgage by suit, the mortgagee shall be entitled, in addition to the debt and interest, to damages for cost and expenses incident thereto, was not usurious, and might be enforced in the *scire facias*. In consequence of this decision, it has become common to insert a provision not only in mortgages, but notes and other instruments for the payment of money, that the creditor, in the event of being obliged to resort to a suit, shall recover a certain percentage as commissions to the attorney who is retained by him to collect the debt. This commission, it has been held, does not belong to the attorney, but to the creditor. It cannot be collected as costs, but must be included in the judgment (*Mahoning County Bank's Appeal*, 8 Casey, 158; *McAllister's Appeal*, 9 P. F. Smith, 204; *Faulkner v. Wilson*, 3 W. N. C. 339; *Schmidt & Friday's Appeal*, 1 Norris, 524). In *Robinson v. Loomis*, 1 P. F. Smith, 78, it was ruled that such commission was not a penalty, but an agreed compensation to the mortgagee for expenses incurred by the default of the mortgagor.

It is undoubtedly true that the parties to a contract may lawfully agree that the damages in case of a breach shall be liquidated at a certain amount. Equity will not relieve against such a contract fairly entered into, unless it is evidently a penalty. This principle of liquidated damages is not applicable, however, to a contract for the loan of money—at least such stipulation is subject to the control of courts of equity. As in the days of Solomon, "the borrower is servant to the lender," and courts of equity from the earliest period have assumed the jurisdiction of relieving the borrower from unreasonable and oppressive stipulations, exacted from his necessities, altogether apart from the statutes against usury. Especially has this always been the case as to mortgages. Agreements embarrassing or restraining the equity of redemption have invariably been set aside. The stipulated commission for

the attorney may be so far beyond the ordinary rate charged for such services as to require imperatively the interposition of the equitable powers of the court. Equity has always been a part of the law of Pennsylvania. In the administration of equitable principles it is the court and not the jury who exercise the functions of the chancellor, even where the action is in the common-law form. The jury, like the same tribunal in an issue directed by the chancellor, decide disputed facts; but it is the court that must be satisfied and apply the equity on the facts found or undisputed. If they think an equitable title to relief not made out by the proofs, it is their duty so to direct the jury, and *contra* if they think the equity has been established. These rules are so familiar and well settled that it would be a work of supererogation to cite the numerous cases which support them.

We think these principles apply to the questions raised upon this record. The lender of money on any species of security cannot exact an unreasonable stipulation in the shape of an agreed liquidation of damages. Equity interposes her shield to protect the borrower. The debtor in cases of this kind will readily yield to the demand of the creditor, as he would be apt to regard collection by suit as a remote and improbable contingency. Even at law what is reasonable is often, indeed, a question of fact, but in many cases it is a pure question of law. Thus, notice of the non-payment of a promissory note, though it was at first submitted to the jury to decide whether it was within reasonable time, is now unquestionably the exclusive province of the court; so it is now held that after a lapse of seven years an abandonment of a title by settlement is a conclusive presumption of law. No court has ever thought of sending an issue to a jury to determine what is reasonable compensation to trustees. They would be a tribunal entirely unsafe to intrust with such a question. These decisions have been reached by the necessity of certainty in the rules in such cases. Many other illustrations could be given. It is important, unless we are prepared to say that the lender may stipulate for any amount as commissions for the collection of his debt, that there should be some more certain rule than could be reached by submitting every case to a jury. It would practically in a great number of cases have the effect of destroying the stipulation altogether. If the question must in every case be referred to a jury, the creditor will abandon the claim sooner than encounter the delay and the risk of a very small sum being allowed. The court, from practical knowledge of professional work, are able to say in every particular

case what ought to be the compensation or rate of commissions for collecting a debt by suit. Whatever is stipulated beyond a reasonable rate should be relieved against upon equitable principles. Certainly, no certain commission can be determined upon to be applied to all cases. As responsibility, as well as labor and skill, is involved, in reason and the usage of the profession it depends upon the amount collected, but not absolutely so. If there should be no defence to the mortgage or other instrument of writing for the payment of money, the court in giving judgment can decide whether the stipulated rate is too large, and enter judgment for what is right. Should, however, a defence be set up in whole or in part, and the case necessarily go to a jury, it would be the province of the court to instruct the jury what, under all the circumstances, should be allowed, of course not exceeding the agreed rate.

It does not appear by the paper-books that there was in this case any rule for judgment for want of an affidavit of defence, though it does appear that there was no other defence than the amount of the collection fee. Had there been such a rule, the court should have decided the question, and not have sent the case to the jury. We think the learned judge below was right in refusing to leave it to the jury to determine the rate of commission, but he was wrong in instructing them to find the full amount agreed upon. Five per cent. upon \$14,000, in other words, \$700, was far beyond what was reasonable, even in view of the fact that the defendant below had interposed a defence against the commission, and that the case might be carried by writ of error to this court. We think even under these circumstances two per cent. would have been an ample and liberal allowance, and the jury should have been so instructed. In general, this court will not review the exercise of a sound discretion by an inferior court upon such a question, and the presumption will always be in favor of their decision unless it is plainly excessive, or, as appears to have been the case here, founded on the mistaken idea that they had no equitable power to interpose and moderate the agreed amount.

*Judgment reversed, and venire facias de novo awarded.*¹

MERCUR, J., dissented.

¹ *Wilson v. Ott*, 173 Pa. St. 253 (1896), accord. *Clawson v. Munson*, 55 Ill. 394 (1870), *contra*.

Cf. *Uhlfelder & Co. v. Carters' Admr.*, 64 Ala. 527 (1879).

As to fixing the amount of costs in foreclosure, the subject is often regulated by statute. Thus see, N. Y. Code Civ. Proc., §§ 3252-3254.

CHAPTER II (*Continued*)

SECTION IV—TACKING COLLATERAL CLAIMS

BAXTER *v.* MANNING

HIGH COURT OF CHANCERY, 1684

(1 *Vern.* 244)

THE plaintiff makes a mortgage of his estate to the defendant, and afterwards the mortgagee advances and lends more money unto the plaintiff, the mortgagor, on his bond. The plaintiff brings his bill to redeem. The defendant insists to have his bond debt as well as the mortgage-money paid him.

PER CURIAM.¹ Although there is no special agreement proved in this case, that the land should stand as a security for the bond debt, yet the mortgagor shall not redeem without paying both.²

CHALLIS *v.* CASBORN, Finch, Pre. Ch. 407 (1715). Before LORD COWPER, L. C. In this case it was said by Mr. Vernon, and agreed to by the court, that if a man has a debt owing to him by mortgage and another on bond from the same person, that he cannot tack them together against the mortgagor, but that he shall be let into a redemption on payment of the mortgage-money only; but the heir in such case shall not be let into a redemption without payment of both, because the land in his hands is chargeable with the bond, even at law; and now, since the statute against fraudulent devises, the devisee of the equity of redemption is in the same case, and cannot redeem without payment of both, because the statute makes such devise void, as against creditors, and then the devisee stands

¹ SIR FRANCIS NORTH, LORD KEEPER.

² Reg. Lib. 1683. A. fol. 730. It was referred to the Master to enquire whether the debts secured in this case by bond were separate or in-

cluded in the mortgage, and in case they should prove distinct debts, then the decree to be as above, and so made 31st January subsequent. Reg. Lib. 1684. A. fol. 252.

in the same place as the heir must have done if no devise had been made; but before that statute such devisee would not be liable to the bond debt any more than the mortgagor himself.

HEAMS v. BANCE

HIGH COURT OF CHANCERY, 1748

(3 *Atk.* 630)

LORD CHANCELLOR, since Hilary term last, ordered this cause to stand over, to search the register's book for the case of *Ridout v. Lord Plymouth*, which had been mentioned at that time as an authority in point, but, being looked into it, did not appear to be at all similar to the present, in which the question is whether a mortgagee who lent a further sum afterwards upon bond should be allowed to tack it to his mortgage in preference to other creditors under a trust for payment of debts created by the will of the mortgagor?

LORD CHANCELLOR [HARDWICKE]. I have considered this case, and am inclined to think the mortgagee shall not be allowed to tack the bond to the mortgage; with regard to the heir of the mortgagor, the reason why he shall not redeem the mortgage without paying the bond likewise is to prevent a circuitry, because the moment the estate descends upon him it becomes assets in his hands and liable to the bond; a devisee, too, of the mortgaged premises for his own benefit is subject to the same rule since the statute of fraudulent devises made in favor of bond creditors.

But this is a devise in trust for the payment of debts, and the descent is, consequently, broke; so that, as I am at present advised, I am of opinion the mortgagee can have no priority with regard to his bond, but as to that must come in *pro rata* with the rest of the creditors under the trust; but if the counsel for the mortgagee have an inclination to be heard on this point, it shall stand over.

The Attorney General, of counsel for him, said he thought the point was too strong against the mortgagee to be maintained, and the court thereupon made their decree accordingly.¹

¹ "Lord Chancellor [Thurlow] said the only reason why the mortgagee can tack his bond to his mortgage is to prevent a circuitry of suits: it is solely matter of arrangement for

that purpose, for in natural justice the right has no foundation."—*Lowthian v. Hasel*, 3 Bro. C. C. 162 (1790).

"I have looked into all the cases,

LEE v. STONE, 5 Gill & J. 1 (Maryland Ct. of App. 1832). *DOWSEY*, J. (p. 21). It has been further contended that the appellants are to be first paid, as well the balance due them from Key as that which appears on the auditor's account—Booth, as the security, being answerable for the defalcations of the guardian; that, the appellants being seized of the legal estate in the land sold, their legal title could not be taken from them until they were paid, not only the remaining balance of the purchase money, [but all other debts] upon whatever account due from Booth to them; and this pretension is rested upon the familiar principles of equity, "that he who seeks equity must do equity;" "that a multiplication or circuity of action should be avoided."

But these principles have never been carried to the extent that would be necessary to their affording relief to a party in the predicament of the present appellants. They stand here in the character of complainants seeking to enforce their lien for a balance of the purchase money by a sale of the premises on which their lien attaches, and require this court not only to enforce their lien, but to tack to it another debt, apart from such their application is entitled to no priority over other creditors, and this to the exclusion of another creditor before the court, whose debt is secured by a lien on the premises. If there be any case to warrant this requisition, it has not been presented to our notice in the argument, and has certainly escaped our researches upon the subject. It is true that if a mortgagor goes into chancery to redeem, upon the axioms of equity above mentioned he will not be permitted to do so but upon payment, not only of the mortgage debt, but of all other debts due from him to the mortgagee. In this there is no prejudice to the rights of others; nobody has a right to complain; no injustice is done to anybody.

But it is also true that if the mortgagee seek a foreclosure in chancery, the mortgagor will be permitted to redeem upon pay-

which are very dissatisfactory. The present practice, that a bond cannot be tacked to a mortgage as against the mortgagor, but may against his heir, does not seem to have been always the course. . . . Now, at least by the modern cases, it is laid down that the mortgagee cannot tack a bond against the mortgagor, nor against creditors, but may against the heir, merely to prevent circuity

of action. Why not against the mortgagor, if the rule is that where a man having one security lends more money to the same person, that person shall pay his whole debt, or shall not redeem at all."—*Per* SIR RICHARD PEPPER ARDEN, M. R., in *Jones v. Smith*, 2 Ves. 372 (1794).

And see, *Coleman v. Winch*, 1 P. Wms. 775 (1721); *Powis v. Corbet*, 3 Atk. 556 (1747).

ment of the mortgage debt only, no matter to what amount, on other accounts, he may stand indebted to the mortgagee. And it is equally clear that if a subsequent mortgagee or judgment creditor file a bill to redeem, he will be permitted to do so upon the payment of the mortgage debt alone. Whilst these well settled principles of equity remain unshaken, upon no system of analogy or consistency can the claim of the appellants be gratified. Their doctrine is in effect simply this, that in all cases where the sale of the real estate of a deceased debtor is decreed, the debts due to the heirs at law to whom such estate has descended, be their nature what they may, must first be paid, even to the exclusion of judgment creditors. To such a length the doctrine of tacking has never yet been carried.¹

¹ "There is no doubt as to the right of the plaintiff (mortgagor) to redeem the whole of the premises mortgaged; but as he who will have equity must do equity, it must be on condition not only of paying the sum charged upon the land, but the debt collaterally due to the mortgagee."—*Per* HOSMER, Ch. J., in *Scripture v. Johnson*, 3 Conn. 211 (1819). *Walling v. Aiken*, 1 MacM. Ch. 1 (1840); *Lake v. Shumate*, 20 S. C. 23 (1883); *Anthony v. Anthony*,

23 Ark. 479 (1861), and (*semble*) *Rowan v. Sharps Rifle Mfg. Co.*, 33 Conn. 28 (1865), *accord*.

The cases generally are *contra*: *Dorrou v. Kelly*, 1 Dall. (Penn.) 142 (1785); *Bridgen v. Carhartt*, 1 Hopk. Ch. (N. Y.) 234 (1824); *Presbyterian Corporation v. Wallace*, 3 Rawle (Penn.), 109, 155 (1831); *Bacon v. Cottrell*, 13 Minn. 194 (1868); *Mahoney v. Bostwick*, 96 Cal. 53 (1892); *Brooks v. Brooks*, 169 Mass. 38 (1897).

CHAPTER II (*Continued*)

SECTION V.—MORTGAGEE'S ACCOUNT

(a) *Waste, Repair and Improvements*

HANSOM *v.* DERBY

HIGH COURT OF CHANCERY, 1700

(2 *Vern.* 392)

THE bill being to redeem a mortgage, on the hearing an account was decreed and £240 reported due; to which report the plaintiff had taken exceptions. The cause thus standing in court, the LORD KEEPER [SIR NATHAN WRIGHT], on a motion and reading affidavits that the defendant had burnt some of the wainscot and committed waste, ordered the defendant to deliver up possession to the plaintiff, who was a pauper, giving security to abide the event of the account.¹

RUSSELL *v.* SMITHIES

COURT OF EXCHEQUER, 1792

(1 *Anstr.* 96)

ON a bill of foreclosure, it was referred to the Deputy Remembrancer to take account what the mortgagee had received from the rents, &c., or might have received, without wilful neglect in her. It appeared that the premises (malt house, etc.) had been allowed to fall so much out of repair that the rent fell from £22 to £18. Plaintiff had done some repairs and had held 40 years.

¹ "So, where a mortgagee in fee in possession commits waste by cutting down timber, and the money arising by the sale of the timber is not applied in sinking the interest and principal of his mortgage, the court,

on a bill brought by the mortgagor to stay waste and a certificate thereof, will grant an injunction."—*Per Lord CH. HARDWICKE*, in *Farrant v. Lovel*, 3 Atk. 723 (1750).

Graham & Stanley argued that the mortgagee in possession, being only a trustee till foreclosure, is bound to keep the premises in the same repair as if he was owner; 2 Vern. 392; 3 Atk. 518; and that the diminution in value should have been charged on the plaintiff, as she might have received the difference if she had repaired.

BY THE COURT: The mortgagee has done some repairs; and, as the only proof of these repairs being insufficient is the diminution in value, we must confirm the report; for it cannot be supposed that, after 40 years possession, the mortgagee is bound to leave the premises in as good condition as he found them.¹

DEXTER v. ARNOLD, 2 Sumner, 108. (Circuit Court of the United States, 1834.) Bill in equity to redeem a mortgaged estate.

STORY, J., delivered the opinion of the court:—

The fourth exception is on account of the Master's having made a deduction of the supposed rent, upon the ground that the premises were out of repair and partly untenable while in possession of the mortgagee and his representatives. The argument seems to proceed upon the ground that the mortgagee was bound to keep the premises in good repair, and therefore ought to be accountable for such rents as he might have obtained if he had done his duty in regard to repairs. We know of no universal duty of a mortgagee to make all sorts of repairs upon the mortgaged premises while in his possession. He is bound to make reasonable and necessary repairs. But what are reasonable and necessary repairs must depend upon the particular circumstances of the case. If a house is very old and dilapidated, he is not bound to go to extraordinary expenses to put it into full repair, if those expenses will be greatly

¹ In *Wragg v. Denham*, 2 Y. & Coll. 117 (1836), ALDERSON, B., said: "I think, also, that a mortgagee ought not to be charged exactly with the same degree of care as a man is supposed to take who keeps possession of his own property. But if there be gross negligence, by which the property is deteriorated in value, the mortgagee who is in possession is trustee for the mortgagor to that extent that he ought to be made

responsible for that deterioration during the time of his possession. It is not necessary to go the length of shewing fraud in the mortgagee; gross negligence is sufficient."

As to improvements and repairs to the mortgaged property made by a mortgagee in possession, see also *Sandon v. Hooper*, 6 Beav. 246 (1843); *Shepard v. Jones*, 21 Ch. D. 469 (1882).

disproportionate to the value of the estate, or to his own interest therein. Certainly it cannot be pretended that he is bound to make new advances on the estate. In *Godfrey v. Watson*, 3 Atk. 518, Lord Hardwicke said that a mortgagee in possession is not obliged to lay out money further than to keep the estate in necessary repair. In *Russell v. Smith*, 1 Anst. R. 96, it was decided that a mortgagee, after long possession, was not bound to leave the premises in as good a condition as he found them. The fact, also, that there has been a diminution of the value of the rents was there declared not to be sufficient proof of a want of proper repairs. It is quite a different question whether, if the mortgagee lays out money in proper permanent repairs for the benefit of the estate, he may not be allowed to claim an allowance therefor. That is a point dependent upon other considerations. But where a mortgagee is guilty of wilful default or gross neglect as to repairs, he is properly responsible for the loss and damages occasioned thereby. That was the doctrine asserted in *Hughes v. Williams*, 12 Ves. 495. And there is the stronger reason for this doctrine, because it is also the default of the mortgagor himself, if he does not take care to have suitable repairs made to preserve his own property. In the present case, however, the point does not arise, for there is no evidence in the Master's report which establishes any fact of wilful default or gross negligence in the mortgagee.

These remarks dispose also of the fifth exception, which is founded upon the supposed dilapidations of the buildings, while in possession of the mortgagee. There is no proof whatever that these were caused by his wilful default or gross negligence; but they were the silent effects of waste and decay from time.

MOORE v. CABLE

COURT OF CHANCERY OF NEW YORK, 1815

(1 *Johns. Ch.* 385)

BILL for the redemption of a mortgage. On the 26th of February, 1789, William Brown being seised of the premises, lot No. 54 in Smith & Graves's patent, conveyed the same to Joseph Roe, who, for securing the purchase money, reconveyed them to Brown by mortgage dated the 27th of February, 1789, and conditioned for the payment of £40, with interest, on the 1st of May, 1790. On the 28th of October, 1794, the mortgage was assigned to the defendant

for the consideration of £30 by the brother of Brown, as his attorney. The heirs of Roe, on the 1st of August, 1807, sold and conveyed the premises to the plaintiff with covenants and warranty.

It appeared that the defendant entered into actual possession of the premises, by his tenants, in 1800, but had, previous to that time, exercised acts of ownership. He continued in possession until 1808, when he, in conjunction with one Corbin, took a lease from the heirs of Roe. Corbin, being in as tenant of the defendant, consented to let in the plaintiff with him; and the defendant brought an action of ejectment and recovered judgment in 1813, and has since continued in possession and made improvements by clearing part of the land, and has received the rents and profits. The plaintiff did not know until the trial of the ejectment in 1813, that the defendant held under a mortgage, and had in 1807 offered to purchase his interest.

THE CHANCELLOR [KENT]. Two questions are presented in this case:

1. Is the plaintiff entitled to redeem? ¹

2. The next question is, whether the defendant, standing in the place of the mortgagee, can be allowed for what the case states as improvements in clearing part of the land. Such an allowance appears to me to be unprecedented in the books, and it cannot be admitted consistently with established principles. The defendant was, in this case, a volunteer. Instead of calling upon the debtor, or foreclosing the mortgage, he elected to enter upon uncultivated lands, and to exercise acts of ownership by clearing a part. To make the allowance would be compelling the owner to have his lands cleared, and to pay for clearing them, whether he consented to it or not. The precedent would be liable to abuse, and would be increasing difficulties in the way of the right of redemption. Many a debtor may be able to redeem by refunding the debt and interest, but might not be able to redeem under the charge of paying for the beneficial improvements which the mortgagee had been able and willing to make. The English courts have always looked with jealousy at the demands of the mortgagee, beyond the payment of his debt. In *French v. Baron*, 2 Atk. 120, the Chancellor would not allow the mortgagee anything more than his principal and interest, though there was a private agreement between the

¹ The opinion on this point is omitted, the court holding that the possession of defendant was not of

such a character nor so long continued as to operate as a bar.

mortgagor and mortgagee for an allowance for the mortgagee's trouble in receiving the rents and profits of the estate. The same thing was repeated in the case of *Godfrey v. Watson*, 3 Atk. 517, and Lord Hardwicke there said that a mortgagee in possession was not obliged to lay out money any further than to keep the estate in necessary repair; but if the mortgagee had expended money in supporting the title of the mortgagor when it had been impeached, he would allow it. The same doctrine was maintained in the case of *Bonithon v. Hockmore*, 1 Vern. 316, in which it was declared that no allowance was to be made to a mortgagee or trustee for their care and pains in managing the estate.

I shall, accordingly, direct a master to compute the principal and interest due on the mortgage down to the 1st of January last, and that, in taking the account, he charge the defendant with the net amount of the rents and profits received, except such as shall appear to have exclusively arisen from his own expenditures in improvements; and that he allow for the expense of necessary reparations, if any, but not for improvements in clearing part of the land; and that he report with all convenient speed; all the other questions are in the meantime reserved.

*Decree accordingly.*¹

¹The authorities generally are accord. *Clark v. Smith*, Saxt. (N. J.) 123 (1830); *Gillis v. Martin*, 2 Dev. Eq. (N. C.) 470 (1833); *McCarron v. Cassidy*, 18 Ark. 34 (1856); *Sanders v. Wilson*, 34 Ver. 318 (1861); *Adkins v. Lewis*, 5 Oreg. 292 (1874); *Cook v. Ottawa University*, 14 Kans. 548 (1875); *Equitable Trust Co. v. Fisher*, 106 Ill. 189 (1883).

In Pennsylvania the cost of permanent improvements "necessary and beneficial for the proper use of the property" will be allowed in an action of "equitable ejectment" brought by a mortgagor against a mortgagee in possession. *Wells v. Van Dyke*, 109 Penn. St. 380 (1885).

In Massachusetts, by statute (*Pub. Stat. Ch.* 181, *Sec.* 23), "All sums expended in reasonable repairs and improvements" are allowed. *Merriam v. Goss*, 139 Mass. 77 (1885). And see *Gordon v. Lewis*, 2 Sumn. 143, 149 (1835), where this doctrine is recognized by STORY, J.

But that the right of the mortgagee to an allowance even for necessary repairs is not absolute, see *Bank of Australasia v. United Co.*, 4 App. Cas. 391, 408 (1879), and *Booth v. Baltimore Steam Packet Co.*, 63 Md. 39 (1884). In *Barthell v. Syverson*, 54 Iowa, 160 (1880), such right seems to be denied.

MICKLES v. DILLAYE

COURT OF APPEALS OF NEW YORK, 1858

(17 N. Y. 80)

APPEAL from the Supreme Court. The action was for the redemption of certain premises in the city of Syracuse, mortgaged to Philo D. Mickles. The trial was before a referee, who found that the mortgaged premises were, in 1840, conveyed to Philo D. Mickles by one Fitch. There was then outstanding a mortgage upon the premises, executed by Fitch to David Hall. Philo D. Mickles conveyed to the plaintiff, with warranty, March 8th, 1841, for the price of \$4000, to secure \$2000 of which the plaintiff executed a mortgage, which in this suit he sought to redeem. This mortgage and the bond collateral thereto were, in April, 1841, assigned by Philo D. Mickles to John Townsend. Philo D. Mickles purchased the Fitch mortgage on September, 23d, 1843, and on the 6th of November, 1843, assigned it to John Townsend, without the knowledge or consent of the plaintiff, so far as the evidence showed. Townsend on the 23d of September, 1846, sold the premises to Charles A. Wheaton for \$1750, upon a foreclosure of the Fitch mortgage, of which no notice was served on the plaintiff. At the time of this sale, Wheaton was the owner, by assignment from Townsend, of the mortgage for \$2000, executed by the plaintiff to Philo D. Mickles. Wheaton took possession of the premises, and conveyed the same, with warranty, December 19, 1846, to John A. Robinson, who conveyed, November 19th, 1852, to Henry A. Dillaye, also with warranty. The only question in dispute in this suit was as to the allowance to be made to Dillaye for improvements after he took possession under the deed from Robinson; the effect of the purchase by Philo D. Mickles of the Fitch mortgage being the subject of litigation in another suit.

P. D. Mickles was in possession of the premises at the time he conveyed them to the plaintiff, and when he received the mortgage now sought to be redeemed. From that time until the sale under the attempted foreclosure he continued to rent them in his own name and to receive the rents, without disclosing the interest of the plaintiff. They were assessed to him. Wheaton, the purchaser, went into possession immediately after the sale, the tenants of P. D. Mickles attorning and paying the rent to him. P. D. Mickles, who was examined as a witness, testified that when he heard of

the sale, which he supposed was by virtue of the mortgage executed by the plaintiff, he told Wheaton he was very glad of it. He understood that the premises sold for enough to pay the mortgage, and he considered the matter settled, and that Wheaton had obtained a perfect title. The purchasers of the premises under Wheaton took possession at the time of their respective purchases. There was a brick building on the lot, which was erected by P. D. Mickles in 1842 or 1843. It was about nineteen feet wide, thirty-five feet long and two stories high. After Dillaye purchased, and in 1852, it was found that the old building was in a dilapidated condition, and was ready to fall down. The walls were badly cracked, particularly the one in the rear. It could have been repaired at an expense of about \$250, by taking down the rear and one of the side walls and rebuilding them. Dillaye caused it to be rebuilt and enlarged, at an expense of about \$5000, increasing its length to seventy feet, preserving one of the walls and the floors, and making use of the old materials so far as they would answer. He covered it with a tin roof, and put in gas and water pipes. He then rented it in its improved condition.

The referee found the foregoing facts in substance; and stated that the improvements made by Dillaye were permanent and valuable and were made by him in the full belief that he was the absolute owner of the premises. He added that it appeared from the evidence that while the improvements were making, the plaintiff was absent from the county of Onondaga and that there was no evidence that he was aware of the fact while the improvements were progressing. In matter of law he determined that the plaintiff was not obliged to allow anything on account of the rebuilding beyond what it would cost to repair the old tenement. He proceeded to state the account, charging the plaintiff with the mortgage debt and interest, the repairs estimated upon the principle above stated, premiums of insurance and taxes, and the interest on these last items, and crediting him with the rents received, but without including the increased rent on account of the rebuilding, and making due from the plaintiff, to be paid on the redemption, \$1885.99. The defendants excepted. Judgment was rendered, allowing a redemption upon the payment of that sum according to the report, which was affirmed at a general term in the fifth district. The defendants appealed.

DENIO, J. The right of a mortgagor who has made default in the payment of the mortgage debt according to his contract, and

especially where the mortgagee or his assigns has lawfully acquired the possession, is in equity, and not a strict legal right. It would be impossible for the plaintiff to obtain possession of these premises by any suit or proceeding known to the law, except a suit in equity. When the mortgagor comes into a court of equity in such cases to redeem, he must do equity to the mortgagee, or the court will consider the estate absolute in the latter; and the redemption, when allowed, will be decreed either absolutely or under certain conditions according to the nature and justice of the case. (Powell on Mortgages, 387, 388.) In conformity with this idea of the nature of the equity of redemption, the Court of Chancery has always obliged the mortgagor to submit to equitable conditions. It was formerly held, for example, that if the mortgagor, after giving the mortgage, had borrowed a further sum of the mortgagee, the latter was not obliged to submit to a redemption until both debts should be paid (*id.*, 391, 392.) The tendency of modern decisions has been to limit and define the power of the mortgagee to insist upon conditions to the redemption. It is by no means intended to state there is any unlimited discretion in courts of equity to compel the owner of an estate bound by a forfeited mortgage to do whatever may in a popular sense and without regard to legal precedents be considered equitable in the particular case. It is, however, useful to bear in mind the origin and true character of the right of redemption, when called upon to determine a case not falling within any settled course of adjudication. It is still the rule that the mortgagor seeking to redeem must do equity to the mortgagee, or those who have succeeded to his rights; and where it has not been settled what is equity under the circumstances which attend a given case, the court must determine it according to its own sense of what is morally just and right.

Where the conventional relation of mortgagor and mortgagee is shown and acknowledged between the parties, there is no reason why the latter should be allowed to obstruct the right of redemption by expending money upon improvements. He can at any time call upon the debtor, by suit of foreclosure, to elect whether he will pay the debt or incur an absolute forfeiture; and if he is found making costly improvements there is good reason to suspect a design to avail himself of the present inability of the debtor to discharge the incumbrance in order to confirm his title to the estate by embarrassing the right of redemption. The general rule is therefore understood to be that upon taking the account in a suit for redemption against a mortgagee in possession, he is to be

charged with the rents and profits, and be allowed only for necessary reparations. (*Moore v. Cable*, 1 John. Ch. R. 387; *Quin v. Brittain*, 1 Hoffman's Ch. R. 353; *Story's Eq.*, § 1016.)

So if the mortgagor, having in fact only a redeemable estate, should, even in good faith, deny the mortgagee's equity, this ought not to prejudice the latter, provided he had done nothing to mislead the mortgagor, and had not unreasonably slept upon his rights. In order to apply the cases in which permanent improvements have been allowed to be taken into the account, it is necessary to have a clear view of the situation of these parties at the time the improvements were made. The defendant Dillaye was in possession as owner under a deed with warranty from a person in possession holding a similar evidence of title from one who had purchased the premises at a sale made professedly upon the foreclosure of a mortgage executed by the true source of title, and who had taken possession under that foreclosure. It is easy to see that an examination, such as a very cautious man would have made, would have shown the invalidity of the foreclosure. But the omission to make an examination was not such gross negligence as to charge the defendant with bad faith. He cannot claim that the estate is irredeemable because he supposed it to be so; but he is not deprived by his omission to examine, of the position of a person acting in good faith without actual notice. The referee has found, what could not be doubted upon the evidence, that he believed himself to be the absolute owner of the lot. But the plaintiff had very materially aided him in coming to this conclusion, or rather, he had suffered him to fall into that error, by an unjustifiable breach of his own obligation. His mortgage was executed in March, 1841. One-fourth of the principal and one year's interest were payable in about one year thereafter, and the whole debt was payable on the 1st day of June, 1845. He was in default for a portion of the debt for eleven years, and the whole amount of principal and interest had been in arrears more than seven years when this suit was commenced. He has not paid the smallest amount, and so far as appears, had never during that period recognized his indebtedness. Conceding, as we must do upon this case, that the sale by P. D. Mickles to the plaintiff, and the giving back of the bond and the mortgage sought to be redeemed was a real and not a colorable transaction, the plaintiff was in possession, up to the sale upon the foreclosure, by P. D. Mickles as his servant or agent or as his tenant. This possession was voluntarily abandoned and given up to Wheaton upon his purchase after foreclosure sale, and the latter

immediately entered upon the reception of the rents and profits as owner, and he and those who succeeded him have continued to possess the premises as owners, unchallenged and without actual knowledge of this right of redemption, until shortly before the commencement of this suit, a period of eight years. When Dillaye erected the building, he and those who had preceded him in the title under the supposed foreclosure had been in possession as owners about six years. It is not found by the referee that the plaintiff was ignorant that his agent or tenant had been put out of possession upon pretence of the old mortgage, or that Wheaton and his grantees were in possession, claiming as owners under that proceeding; and considering that the premises lie in one of the most considerable interior towns, and upon the great thoroughfare through the state, it is no wise probable that he was ignorant. The referee finds indeed that he was not aware of the improvements while they were going on. This is not inconsistent with a full knowledge that his tenant had yielded up the possession to a party claiming the absolute title, and that the occupants were in possession, believing themselves to be the owners. The fact probably is that both parties acted in ignorance of their rights. The old mortgage is claimed to have been extinguished by the operation of a technical rule of law. Had it remained on foot the right to redeem both mortgages would not have been of much if any value until the defendant had improved the premises by the expensive erection which he put upon them. If the plaintiff was not aware of the extinguishment of the old mortgage he would naturally have considered his interest as nominal; and this, I am persuaded, is the explanation of his long inaction. The case, when Dillaye erected the building, was this: he really had the title of a mortgagee in possession, but he supposed he was the absolute owner. The plaintiff had in fact an equity of redemption, but he had abandoned the possession to the defendants, who entered as owners; and he had ceased to claim any interest in the lot. He now finds that he has a valuable equity of redemption; and the question is whether he ought to pay for the improvement as a condition to the redemption. It was necessary that Dillaye should make expenditures to a considerable amount to render the premises tenantable at all; but he laid out more than was strictly necessary, though not more than would have [been] judicious had he been, as he supposed he was, the owner. In *Benedict v. Gilman*, 4 Paige, 58, the plaintiff had purchased under a statute foreclosure which did not cut off the rights of judgment creditors whose lien was subse-

quent to the mortgage, and had taken possession; and he had made permanent improvements in ignorance of the existence of certain judgments in the hands of the defendants. He filed a bill, claiming a strict foreclosure unless the defendants would pay up the mortgage and the value of the improvements, and this was decreed. The chancellor said it would be inequitable and unjust to give the defendants the benefit of these improvements without compelling them to pay an equivalent therefor. The defendant's case in the present controversy is much stronger than the plaintiff's in *Benedict v. Gilman*, inasmuch as the judgment creditors had done nothing to mislead the party in possession, and the negligence of the latter in omitting to search for subsequent incumbrances was at least as great as that of Dillaye in this case. Judge Story has carried the rights of a party in possession, who has in good faith made improvements, altogether beyond what would be necessary to protect the defendant in this case. He says generally that courts of equity have extended the doctrine to cases where the party making the repairs and improvements has acted *bona fide* and innocently and there has been a substantial benefit conferred on the owner (Treatise on Eq., § 1237); and he has carried the principle into practice in a case decided by him in the Circuit Court of the United States. In *Bright v. Boyd*, 1 Story, 478, lands had been sold by an administrator, but the sale was void because he had not given security according to the statute. The heir of the intestate had sued for and recovered the possession against the plaintiff, who derived his title under the administrator's sale. The latter filed a bill in equity in the Circuit Court of the United States to recover of the heir the value of certain improvements which he had in good faith made upon the land, and which included the building of a large dwelling-house. The heir was an infant, and resided in another state; but Judge Story, notwithstanding, referred the case to a master to take an account of the enhanced value of the premises, deducting the rents and profits, with a pretty strong intimation that the plaintiff was entitled to recover them, though he said he would look into the case again upon the coming in of the report. This conclusion could not probably be sustained except upon the principle that one who fraudulently stands by and sees another expending money in good faith upon his land, shall not reclaim the land without paying for the improvements. Chancellor Walworth, I think, laid down the true principle in *Putnam v. Ritchie*, 6 Paige, 390. He decided in a case very similar to that which was before Judge Story, that where

there was no fraud or acquiescence on the part of the person having the legal title, he could not be compelled, even in favor of a party in possession who had made improvements *bona fide*, to allow for such improvements; but he said that such allowances were constantly made by courts of equity where the legal title was in the person who had made the improvements in good faith, and where the equitable title was in another, who was obliged to resort to the court for relief. This, as we have seen, is precisely the case now before the court.

In *Wetmore v. Roberts*, 10 How. Pr. R. 51, the question we are now considering was examined in the Supreme Court by Mr. Justice Hand, with his accustomed industry. It was a suit for foreclosure by a junior mortgagee, the defendant having purchased the premises from one who had bid them in upon a foreclosure of the elder mortgage, in which proceeding the junior incumbrancer was not made a party. It was alleged that the defendant had made improvements in good faith, of the value of \$6000, and it was decided that the premises should be sold, and that the value of the permanent improvements as well as the amount due on the elder mortgage should be paid out of the proceeds; after which the plaintiff was to be paid the amount due on his mortgage. I refer to the authorities relied on by Judge Hand, and also to *Talbot v. Braddill*, 1 Vern. 184, and to Coote on Mortgages, pp. 392, 561.

I am clearly of opinion that the refusal to allow for the erection of the building was erroneous. The judgment of the Supreme Court should be reversed, as respects the account stated by the referee, and there should be a reference in that court to take an account between the plaintiff and the defendant Dillaye, in which the latter should be allowed for the enhanced value of the premises on account of the improvements made by the defendants. In other respects, the order should direct the usual allowances between mortgagor and mortgagee on a bill for redemption.¹

COMSTOCK and PRATT, Js., did not sit in the case; all the other judges concurring,

*Judgment modified and account ordered to be re-stated.*²

¹ Concurring opinion of HARRIS, J., omitted.

² "When, as in this case, a plaintiff has permitted his right to satisfy a mortgage to remain dormant for nearly thirty years, during which others have paid the assessments and taxes, and made improvements in

the belief that they had title under a foreclosure of the mortgage, he cannot complain that, as a condition of regaining possession, he is compelled to account for and pay such taxes, assessments and for such improvements, according to the just and enlightened principles of courts of eq-

(b) *Rents and Profits—Annual Rents*

ANONYMOUS

HIGH COURT OF CHANCERY, 1682

(1 Vern. 45)

A MORTGAGEE shall not account according to the value of the land, viz. He shall not be bound by any proof that the land was worth so much, unless you can likewise prove that he did actually make so much of it, or might have done so had it not been for his wilful default: as if he turned out a sufficient tenant, that held it at so much rent, or refused to accept a sufficient tenant that would have given so much for it.

HUGHES v. WILLIAMS

HIGH COURT OF CHANCERY, 1806

(12 Ves. 493)

EXCEPTIONS were taken by the defendant, a mortgagor, to the Master's report: first, that the Master had charged the plaintiff, a mortgagee in possession personally, and by a receiver under his appointment, with the rents actually received: whereas he ought to have been charged, according to the circumstances in evidence, with the improved rents, at which the estates had been since let by the receiver appointed by the Court, and which ought to have been obtained by the plaintiff, or his receiver, but for their wilful

uity."—*Per GROVER, J., in Miner v. Beekman*, 50 N. Y. 338, 345 (1872).

The doctrine of the leading case is everywhere accepted, the improvement being reasonable and "judicious." *Gillis v. Martin*, 2 Dev. Eq. (N. C.) 470 (1833); *McConnel v. Holabush*, 11 Ill. 61 (1849); *McSorley v. Larissa*, 100 Mass. 270 (1868); *Harper's Appeal*, 64 Penn. St. 315 (1870); *American Buttonhole Co. v. Burlington Loan Assn.*, 68 Iowa, 328

(1896). See, also, *McCumber v. Gilman*, 15 Ill. 381 (1854); *Morgan v. Walbridge*, 56 Vt. 405 (1883). But see *Miller v. Curry*, 124 Ind. 48 (1889), in which it is curiously limited, and compare *Barnett v. Nelson*, 54 Iowa, 41 (1880).

Valuable and lasting improvements allowed out of the rents and profits if made with the knowledge of mortgagor and without objection from him. *Montgomery v. Chadwick*, 7 Iowa, 114 (1858).

neglect or default. Another exception was, that the Master had allowed the plaintiff the sum of 68*l.* for the expense of opening a slate quarry: the defendant contending that it was an illegal and improper act; and the only benefit accruing to the estate thereby being the sum of 2*l.* charged to the plaintiff's account, as the produce of the slates. The defendant was out of possession long before the plaintiff entered, prior mortgagees having been in possession, whom he paid, to prevent foreclosure.

THE LORD CHANCELLOR [LORD ERSKINE]. I do not mean to say that to charge a mortgagee in possession actual fraud is necessary. It is sufficient if there is plain, obvious and gross negligence, by not making use of facts within his knowledge, so as to give the mortgagor the full benefit that the mortgagee in possession of the estate of the mortgagor ought to give him. If, for instance, the mortgagee turns out a sufficient tenant, and, having notice that the estate was under-let, takes a new tenant, another person offering more; an offer, however, not to be accepted rashly. But this case does not furnish even that ground; for with the exception of a proposition to give 7*l.* a year for one tenement, instead of 5*l.* a year, the rent then paid, there is no proof of any proposal for an increase. A reason also is assigned for not accepting the proposal in that instance; that the tenant was in arrear, and the plaintiff was apprehensive of losing that arrear; and there is more difficulty where the estate consists of a number of distinct tenements.

Another circumstance that weighs with me is that the mortgagor, if he knows the estate is under-let, ought to give notice to the mortgagee, and to afford his advice and aid for the purpose of making the estate as productive as possible. If he communicated to the mortgagee plans of improvement in his contemplation, which were disappointed by the embarrassment of his affairs, the Court might take a stricter view of the mortgagee's conduct. In this instance not only such notice was not given, but during this whole period of 16 years, while the mortgagor was out of possession, he never stated that the estate was not managed as it might be.¹ Can the mortgagor lie by, not giving notice that a greater rent may be made, and come afterwards, by way of penal inquiry, to charge the mortgagee with the effect of his own negligence? I agree to the principle that has been stated by the Solicitor-General, that it would be dangerous to say the mortgagee is not answerable except for fraud, and would contradict many decrees. If such gross neg-

¹ Compare *Moshier v. Norton*, 100 Ill. 63, 72 (1881).

ligence can be shewn as comes up to the description of wilful default, he ought to be answerable for it.

But I determine this exception upon the principle that a mortgagee, taking possession, is to take the fair rents and profits, and is not bound to engage in adventures and speculations for the benefit of the mortgagor, but is liable only for wilful default, of which in this instance there is no pretence, this mortgagor not having even communicated that he had any contemplation of improvement or proposed tenants. It would be most dangerous to entangle mortgagees in a minute inquiry, whether some person would have given more, which was never communicated.

Upon the same principle on which I determine the first exception in favour of the mortgagee, I must determine the other exception against him. The principle is the safety of mortgagees. The line cannot be drawn. How can it be ascertained that the mortgagor will want a slate quarry? The amount is in this instance inconsiderable, but the principle would reach the case of a mine. The mortgagee, therefore, having engaged in this speculation, must speculate at his own hazard.

The first exception was overruled, and the other allowed.¹

SHAEFFER v. CHAMBERS

COURT OF CHANCERY OF NEW JERSEY, 1847

(2 Halst. 548)

THE CHANCELLOR [HALSTED]. On reading the testimony, I do not see any good reason why the report of the Master should not be confirmed. A mortgagee, by taking possession, assumes the duty of treating the property as a provident owner would treat it, and of using the same diligence to make it productive that a provident owner would use. If it be a farm, he is not at liberty to let it lie untilled because the house on it, or the house and farm together, were not rented. I see no reason why the farm should not be husbanded, though the buildings on it were not rented. Again, a

¹ See, also, *Felch v. Felch*, 9 Vt. 400 (1845); *Robertson v. Gerriah v. Black*, 104 Mass. 400 (1870); *Moshier v. Norton*, 83 Ill. 519 (1876); *Moshier v. Norton*, 100 Ill. 63 (1881); *Campbell*, 2 Call. (Va.) 421 (1800); *Hogan v. Stone*, 1 Ala. 496 (1840);

mortgagee in possession is not at liberty to permit the property to go to waste, but is bound to keep it in good ordinary repair; and if it be a farm he is bound to good ordinary husbandry.

It appears by the testimony that, for several years of the time during which the defendant has been in possession, the property was not rented, and the whole of it, farm and all, was permitted to lie uncultivated. The Master reports that it was not made satisfactorily to appear to him that the property was thus unoccupied without the default of the defendant. The ground here taken by the Master raises this question: a farm of 85 acres, 25 of it in wood land, under mortgage, is taken possession of by the mortgagee and rented. He remains thus in possession a number of years. Occasionally during this period the premises are vacant and the farm untilld. Is it sufficient for the mortgagee, thus in possession, in order to relieve himself from any charge for rents and profits for the years during which the premises were thus vacant, simply to say that he could not rent them; or should he be held to show proper diligence to procure a tenant? Is the mortgagor to prove that he might have rented it but for his wilful default, as that he turned out a sufficient tenant, or refused to receive a sufficient tenant, as would seem to be held in 1 Vern. 45; or does the fact of the premises being left vacant throw upon the mortgagee the burden of proving reasonable diligence to procure a tenant, as seems to be held in Metcalf v. Campion, 1 Moll. 238.

It seems to me that it will not do for the mortgagee, having thus taken possession, to fold his arms and use no means to procure a tenant; and I am disposed to think he ought to be held to show reasonable diligence to procure a tenant. But, at all events, if the farm and buildings are not rented he ought to cause the farm to be tilled, and that in a husbandlike manner.

From the testimony I think the defendant has been negligent, to say the least, in the manner in which he has treated the premises. No provident owner would have treated them as he has. They have been permitted to go greatly out of repair, and the lands have been so badly husbanded that for several of the last years the whole premises, rented at first by the mortgagee for \$100, have rented for only \$60, and he has been charged but that sum. The defendant, during several years, cut wood and timber from the premises and sold it. The Master, in stating the account, made annual rests when he found that the wood and timber and the rents and profits exceeded the interest and expenses, and applied the income, first, to the interest and expense account, and then to the reduction

of the principal. This was objected to on the part of the defendant. It seems to me the Master was right.

I am satisfied with the general result reached by the Master.

*Exceptions disallowed.*¹

MORRIS v. BUDLONG, 78 N. Y. 543, 555 (Court of Appeals, 1879). This action was originally brought by Mary Morris for an accounting between her and defendant Budlong, and for repayment of moneys alleged to have been paid to him in excess of what he was entitled to; and to have two mortgages, one executed by plaintiff to one Ferguson, and the other by Ferguson to Budlong, canceled and discharged of record. The facts of the case were substantially as follows:

Plaintiff being greatly embarrassed and her farm about to be sold in foreclosure, defendant agreed to bid it in for the benefit of plaintiff, to purchase various outstanding claims against her and to hold the farm "to secure him for such moneys as he should pay out in carrying into effect this agreement, and give her one year in which to redeem by repaying him the moneys he should pay out in carrying into effect the agreement, and that Mrs. Morris should also pay him all expenses, and for his time and trouble in connection therewith." Budlong thereafter purchased the claim above referred to, took a deed of the Morris farm from the sheriff, and on the 23d day of March, 1860, purchased the premises in question on the foreclosure sale, paying therefor in money and by his bond and mortgage \$11,290.87. To raise the money for these purposes, Budlong was obliged to go to Wisconsin to get in some investments which he had there, thus incurring expenses, and an absence from home of three or four weeks. That he should do so was agreed upon at the time the above arrangement was made. Immediately after the mortgage sale Budlong entered into possession of the farm, cultivated it, and received the profits thereof, except such portion as was received by the Morris family, until about March 31, 1866. During the first years that family occupied the whole of the farm house, and during the remainder it was occupied by them and the family of Budlong. The time for payment by Mrs.

¹ *Van Buren v. Olmstead*, 5 Paige (N. Y.), 9 (1834), *accord.* Compare *Dexter v. Arnold*, 2 Sumn. 108, 129 (1834); *Miller v. Lincoln*, 6 Gray (Mass.), 556 (1856); *Richardson v.*

Wallis, 5 Allen (Mass.) 78, (1862); *Sanders v. Wilson*, 34 Vt. 318 (1861), and *Barnett v. Nelson*, 54 Iowa, 41 (1880).

Morris under the above agreement expired and was extended one year. The money was not paid, but no further extension was given. It was claimed in behalf of plaintiff, that defendant held the farm as mortgagee in possession and was chargeable not only with the rents and profits actually received by him, but with the full rental value of the farm, which, it was alleged, had not been worked to its fullest capacity.

DANFORTH, J. An account rendered upon an application to redeem would properly charge the estate with the money advanced by Budlong and interest, with the expenses and compensation provided for by the agreement, and would credit the estate with whatever had been received from it by sales or rents and profits, as incident to the right of redemption, and as an equitable offset against the amount due on mortgage, after deducting taxes, repairs and other necessary expenses incurred on account of the estate. (*Ruckman v. Astor*, 9 Paige, 517.) It would include, therefore, the proceeds of timber sold and rents and profits actually received. That the farm was not worked to its fullest capacity furnishes no ground, under the circumstances of this case, for an enlarged liability. A provident owner might not do that, and there is no fact stated from which the wilful default of Budlong in this respect could be found. Nor has it been. He is in no sense a wrongdoer. He went into possession under the legal title, taken with the knowledge of Mrs. Morris and continued under circumstances which might well have induced a belief that he was in fact the owner of the estate, subject only to an agreement to sell. He was not technically at any time a mortgagee in possession. There was no mortgage. The character is cast upon him by the application of equitable rules to an oral agreement easily susceptible of two constructions, of which the one chosen is in direct contradiction of the written instruments which display his title, and he is therefore chargeable only with what he has received and not with what he might have received. "I think," says Lord Cranworth, in *Parkinson v. Hanbury*, 2 L. R. Engl. and Irish App. 1,¹ "that it is perfectly clear law that where a person becomes possessed of a property, though erroneously supposing that he is a purchaser, if it afterwards turns out that he is not to be treated as a purchaser, but only as a person who has a sort of lien upon the property, that does not make him a mortgagee in possession within the meaning of that rule which charges him with wilful default." In 1 Story Eq. Jur., s. 514a. (10th ed.) it is said:

¹ S. C., L. R. 2 H. L. 1 (1867).

"Where the estate is thrown upon one in the necessary enforcement of his legal rights, or comes to his possession as trustee, he should only be required to act in good faith and to account for what he in fact realizes;" and so in *Moore v. Cable*, 1 J. Chy. 384, Chancellor Kent directed the defendant to be charged only with rents and profits received. In *Harper's Appeal*, 14 P. F. Smith, 315, it is declared that "whatever the rule on accounting might be, where the party charged was a mortgagee under an ordinary formal mortgage, it ought not to be the same, when, by the express agreement of the party seeking equitable relief, he took and held possession as absolute owner." In the case before us there was not only a title taken by the defendant, by the plaintiff's wish, but there is alleged against it only an oral promise to convey at a certain time, upon payment of certain moneys, and no agreement to account in the meantime. There is nothing to show any want of good faith on the part of the defendant in his management of the property, nor that he did not act prudently and according to his best judgment in the matter. The omission of Mrs. Morris to redeem at the end of the time limited, the year, or at the end of the second year, her omission to arrange for further time to do so, the continued occupation of the premises by Mr. Budlong, apparently as owner, with no demand for an account of rents and profits—all bear upon this question, and, with the considerations before adverted to, show that the referee erred in measuring the profits for which Mr. Budlong was liable by the rental value of a farm worked to its full capacity rather than by what he actually received.¹

VAN VRONKER v. EASTMAN, 7 Met. (Mass.) 157, 163 (1843). SHAW, C. J. The account must be reformed by making annual rests. 1. State the gross rents received by the defendant to the end of the first year. 2. State the sums paid by him for repairs, taxes, and a commission for collecting the rents,² and deduct the same from the gross rents, and the balance will show the net rents

¹ *Barnard v. Jennison*, 27 Mich. 230 (1873); *Hall v. Westcott*, 17 R. I. 504 (1891), *accord*.

² Such commissions are allowed in Massachusetts: *Gibson v. Crehore*, 5 Pick. 146, 161 (1827); *Gerrish v. Black*, 104 Mass. 400 (1870); and in Connecticut: *Waterman v. Curtis*, 28 Conn. 241 (1857). But this is exceptional, commissions being generally

refused even where stipulated for: *Bonithon v. Hockmore*, 1 Vern. 316 (1685); *French v. Baron*, 2 Atk. 120 (1740); *Godfrey v. Watson*, 3 Atk. 517 (1747); *Clark v. Smith*, Saxt. (N. J.) 121, 137 (1830); *Harper v. Ely*, 70 Ill. 581 (1878); *Blunt v. Syms*, 40 Hun (N. Y.), 566 (1886). But see *Green v. Lamb*, 24 Hun, 87 (1881).

to the end of the year. 3. Compute the interest on the note for one year and add it to the principal, and the aggregate will show the amount due thereon at the end of the year. 4. If the net annual rent exceeds the year's interest on the note, deduct that rent from the amount due, and the balance will show the amount remaining due at the end of the year. 5. At the end of the second year go through the same process, taking the amount due at the beginning of the year as the new capital to compute the year's interest upon. So to the time of judgment.¹

MOSHIER v. NORTON, 100 Ill. 63, 73 (1881). **MR. JUSTICE SHELDON.** Complainant takes exception to the mode of stating the account in making annual rests. The Master reported that on January 1, 1870, the principal sum due from Norton to complainant was \$8782.50; that the accrued interest thereon to that time was \$8240.93; that the net rents up to that time were \$8617.47. As the amount of rents at that time exceeded all interest due, said amount of the rents to that time was deducted from the whole amount of principal and interest at that time, leaving a balance due complainant of his principal sum, \$8405.96, on January 1, 1870. Then to this sum was added the interest for one year, the taxes paid in 1870, and interest thereon to January 1, 1871, which made the sum of \$9490.48, from which was deducted the rent of 1870 as found, \$1711.50, leaving a balance due complainant of \$7778.98 at that date. Then follow similar annual statements of balances on the first day of January in each year, up to and including January 1,

¹“The two essential points are: First, that when there is a surplus of receipts in any year above the interest then due, a rest shall be made, and the balance remaining after discharging the interest shall be applied to reduce the principal, so that the mortgage shall not continue to draw interest for the face of it, when in fact the mortgagee has in his hands money that should be applied to reduce the principal, and thereby make the interest less for the following year. Secondly, although the amount received in any year be insufficient to pay the interest accrued, the surplus of interest must not be added to the principal to swell

the amount on which interest shall be paid for the following year; for that would result in the charging of interest upon interest, which is not allowed; but the interest continues on the former principal until the receipts exceed the interest due.”—*Jones, Mortgages*, § 1139.

The cases are numerous and generally accord. *Connecticut v. Jackson*, 1 Johns. Ch. (N. Y.) 13 (1814); *Reed v. Reed*, 10 Pick. (Mass.) 398 (1830); *Green v. Westcot*, 13 Wis. 606 (1861); *Gladding v. Warner*, 36 Vt. 54 (1863); *Mahone v. Williams*, 39 Ala. 202 (1863); *Adams v. Sayre*, 76 Ala. 509 (1884); *Bennett v. Cook*, 2 Hun (N. Y.), 526 (1874).

1880, the rents as found for each year exceeding the interest and taxes for the year.

Complainant concedes the mode adopted by the Master in making annual rests was the proper one when no arrears of interest are due at the time the mortgagee enters into possession, but [claims] that, where the interest of the mortgagee is in arrears, as in the present case, when the mortgagee takes possession, the court will not require annual rests to be made, even although the rents and profits may exceed the annual interest, nor until the principal of the mortgage debt is entirely paid off. There is authority for this position and distinction. It appears to be supported by Judge Story in his Eq. Jur., vol. 2, sec. 1016, *a*, and the English cases cited by him. But there are American decisions which lay down a different rule, as we regard, and agreeing with the one which was adopted in this case. *Van Vronker v. Eastman*, 7 Metc. 157; *Green v. Wescott*, 13 Wis. 606; 2 Jones on Mort., secs. 1139, 1140. . . .

No satisfactory reason appears to our minds why, when there is a surplus of receipts in any year above all the interest then due and disbursements, the balance remaining after discharging the interest should not be applied to reduce the principal; and this, irrespective of the fact whether there was or was not interest in arrear at the time the mortgagee took possession. We view the mode adopted by the Master in making annual rests just and reasonable, and find no error therein.¹

(c) *Superior Liens*

GODFREY *v.* WATSON, 3 Atk. 517 (1747). LORD CHANCELLOR [HARDWICKE] said that a mortgagee in possession is not obliged

¹ "Now, thinking, as I do, that, both upon principle and authority, the mere fact of an arrear of interest being or not being due to the mortgagee when the mortgagee takes possession, is not decisive upon the question of rests, but that every circumstance must be regarded, looking at all the accompanying circumstances, looking at the general right of a mortgagee not to be paid piecemeal, looking at the position to which Mrs. Priestly [the mortgagee in pos-

session] has been driven by the wrongful acts of the parties opposed to her, I think that she ought not to be compelled to have her account taken with rests."—*Per* KNIGHT BRUCE, V. C., in *Horlock v. Smith*, 1 Coll. Ch. 287, 297 (1844).

Compare *Finch v. Brown*, 3 Beav. 70 (1840); *Wilson v. Cluer*, *id.* 136 (1840); *Patch v. Wild*, 30 Beav. 99 (1861), and *Bennett v. Cook*, 2 Hun (N. Y.), 526 (1874).

to lay out money any further than to keep the estate in necessary repair; but if a mortgagee has expended any sum of money in supporting the right of the mortgagor to the estate, where his title has been impeached, the mortgagee may certainly add this to the principal of his debt, and it shall carry interest.

HARPER v. ELY, 70 Ill. 581, 584 (1873). MR. JUSTICE CRAIG. It is claimed by appellants that the court erred in allowing the Thompson and McQuestion debt. This debt was secured by a prior trust deed on the premises, and Ely, in order to protect his interest under the mortgage, under which he claimed, was compelled to discharge this lien.

We apprehend there can be no doubt but a mortgagee is entitled to be repaid all sums he may advance for the purpose of removing a prior incumbrance from the mortgaged property. The fact that Ely paid off or purchased this debt, which was a prior lien on the land, could work no hardship on the complainant. It was a subsisting debt, and a lien upon the mortgaged premises, and had to be paid, and whether complainants are required to pay it to Ely, or the original holder, cannot, in anywise, prejudice their rights. But this debt was also secured by the Haddock mortgage, as well as a prior deed of trust, and may be regarded as a part and parcel of the mortgage debt from which complainants are seeking to redeem. In either event, however, we regard the decision of the Circuit Court on this point correct; but it is said ten per cent. interest ought not to be allowed Ely on this claim, after it came into his hands. The claim drew ten per cent. interest in the hands of the original holder, and when Ely bought or paid it, in equity he was subrogated to the rights of the original holder of the claim; and when the original creditor, by the terms of the contract, was entitled to ten per cent. interest, we fail to see upon what principle Ely would not be entitled to the same.¹

¹ *Silver Lake Bank v. North*, 4 Johns. Ch. 370 (1820); *Page v. Foster*, 7 N. H. 392 (1835); *Arnold v. Foot*, 7 B. Mon. (Ky.) 66 (1846); *McCormick v. Knox*, 105 U. S. 122 (1881), and the authorities generally accord.

SIDENBERG v. ELY

COURT OF APPEALS OF NEW YORK, 1882

(90 N. Y. 257)

APPEAL from judgment of the General Term of the Court of Common Pleas, in and for the city and county of New York, entered upon an order made May 11, 1880, which affirmed a judgment in favor of plaintiff, entered on a decision of the court on trial at Special Term.

MILLER, J. This action was brought for the foreclosure of a mortgage made by one William G. Ely, deceased, in 1825, to the Ætna Insurance Company, to secure the sum of \$3000. It contained no clause in reference to taxes and assessments. In 1872, the Ætna Insurance Company assigned the mortgage, together with the bond accompanying the same, to the Excelsior Life Insurance Company. This company paid, while it held the mortgage as assignee, certain taxes, assessments and water rates upon the mortgaged premises, and to redeem the same from tax sales, which together amounted to the sum of \$1640, or thereabouts. In the year 1875, the Excelsior Life Insurance Company assigned the bond and mortgage, with the whole amount due by reason of the payment for taxes, etc., to the plaintiff, who purchased at the request of the mortgagor, and under an agreement to extend the payment of the principal until September, 1878, previous to which time this action was commenced. Subsequent to his purchase, the plaintiff paid certain taxes and assessments, amounting to the sum of \$925. At the time of the assignment to the plaintiff, the sum of \$934.78 was due for interest. The defendant Catharine Ely is the widow and executrix of the mortgagor, who died leaving a will, by which he devised her the estate for life with remainder over in fee to the children of his brother James, who are defendants in this action. Upon the trial, the court allowed for the taxes, assessments and water rates paid by adding them to the mortgage, which, with the principal and interest found due to the plaintiff, amounted to the sum of \$7365.70.

The most material question upon this appeal arises in regard to the rights of the plaintiff to the amount of taxes and assessments paid by him and his assignor, and to collect the same out of the mortgaged property. The rule seems to be established by abun-

dant authority that when the owner of mortgaged property refuses or neglects to pay taxes and assessments, or liens of a like nature, which are imposed upon the mortgaged premises, the mortgagee has the right to pay the same in order to protect his security, and the amount so paid may be added to and become a part of the mortgage debt, which may be enforced upon a foreclosure of the mortgage.

Willard, in his work on Equity Jurisprudence, at page 446, lays down the rule that taxes paid may be added to the mortgage debt, and he adds, "so money paid by the mortgagee to redeem the premises from a tax sale becomes part of the mortgage debt in equity;" he further says at page 448, "with regard to the amount to be paid on redeeming, it may be said, that as taxes are a legal charge upon the estate, they may, if necessarily paid by the mortgagee, be added to the mortgage debt." The same rule is upheld in *Thomas on Mortgages*, at pages 86 and 276, and in *Jones on Mortgages*, at sections 77 and 1134. In the last authority it is laid down that this is so, although there be "no tax clause in the mortgage."

Numerous cases in the reports sustain this doctrine. (*Eagle Fire Ins. Co. v. Pell*, 2 Edw. Ch. 631; *Burr v. Veeder*, 3 Wend. 412; *Brevoort v. Randolph*, 7 How. Pr. 398; *Faure v. Winans*, Hopk. Ch. 283; *Marshall v. Davies*, 78 N. Y. 414; *Robinson v. Ryan*, 25 id. 320; *Williams v. Townsend*, 31 id. 414.) These cases are criticised by the counsel for the appellant, and it is claimed they do not sustain the doctrine contended for. While all of them do not entirely cover, yet they tend to the support of the principle that a mortgagee, who to save his mortgage and protect his security is under the necessity of paying the taxes and assessments to prevent the property from being sold, should be allowed for the same as a part of his mortgage debt upon the foreclosure of his mortgage. Whether the doctrine of tacking, as claimed by the counsel for the appellants, has any application, is not important to consider, if the principle we have stated can be invoked to save the mortgagee from the sacrifice of the property by reason of unpaid taxes or assessments. In accordance with the authorities already cited, it is not necessary that the premises should be sold prior to the payment of the taxes or assessments before the mortgagee is authorized to pay the same, and add the amount paid by him to his mortgage. (See *Eagle Fire Ins. Co. v. Pell*, and *Williams v. Townsend*, *supra*.)

The doctrine that neither the plaintiff nor his assignor could have any benefit from the doctrine of subrogation, because they voluntarily paid the taxes and were conspirators, cannot be upheld.

There is no finding in the case that either of them purchased the mortgage with the intent of paying the taxes and assessments so as to relieve the life estate and cast the burden upon the remaindermen; they were paid evidently in self-defense, and for the purpose of saving their liens as mortgagees. It cannot, therefore, be said that they were volunteers, or that they acted in bad faith as to others, or to any one who was under a legal necessity to make the payment, even if it may be urged that if the taxes had remained a lien, the life-tenant would have been obliged to pay them to prevent a sale of the property by the State or a return thereof, as that furnishes no reason why the plaintiff had not a perfect and complete right to protect his security from sale for the taxes. There is no rule by which the holders of the mortgage were obliged to delay the payment so as to compel the remaindermen to take action in regard to the same and relieve the property. They should have been vigilant in looking after their rights, and if they had done their duty the taxes would not have accumulated. Having failed to perform a plain duty, if they desired to protect the property against the taxes, after they have permitted the mortgagee to pay the taxes, they are in no position to object that it operates as a hardship upon them. They would have had an undoubted right to make application for the appointment of a receiver to collect the rents and apply them to the payment of the taxes. (*Cairns v. Chabert*, 3 Edw. Ch. 313; 1 Washburn on Real Prop. 97.)

In the case we are considering, the taxes remained unpaid from the year 1865 to the year 1872, and then again from 1872 to 1874, all inclusive. For eight years they were allowed to accumulate in the first instance, and afterward for three years, and during that period no effort was made to pay them, nor any attempt to compel the owner of the life estate to pay them, or the appropriation of the rents for that purpose. Here was a gross neglect which would have resulted in the sale of the property, and perhaps the destruction of the estate, but for the intervention of the owner of the mortgage.

Again, if the mortgagee or his assignee had the right to pay within the authorities to which we have referred, to protect his mortgage lien, any equity which might have existed between the life-tenant and the remaindermen cannot destroy or take away that right. The remainderman's rights and his interests are subject to the right of the mortgagee, which was a prior and superior right given by the mortgagor. If the mortgagor had survived, and the mortgagee had paid the taxes, the amount paid would clearly have

been a claim against the mortgagor and the mortgaged premises. The devisees of the mortgagor cannot have any greater or better right than the mortgagor, and they stand in his place. There was no evidence of any fraud or any conspiracy, to impose upon the remaindermen an obligation which belonged to the life-tenant to perform. The mortgage was purchased by the plaintiff in good faith, as found by the trial court, which also refused to find to the contrary. The effect of the payment was, although it increased the amount of the mortgage, to cancel and discharge the lien of the taxes for the same amount. The estate of the appellants was bound to pay the taxes, and the payment by the mortgagee, or his assignee, did not add or increase the burden imposed thereby, but in fact it operated to reduce the rate of interest on the amount of such taxes. Equity could not grant relief to the remaindermen, for the reason alone that the lien had been changed from a tax lien to that of a mortgage lien, and we are unable to see why the life-tenant could not as well have been charged with the burden of the taxes after payment by the mortgagee, as he could before such payment, and in this case no reason existed why the interest of the life-tenant in the fund after payment of the mortgage by a sale should not have been burdened with this charge.

The defendants claim they are entitled to pay up the mortgage and to be subrogated as mortgagees, leaving the plaintiff to his remedy, or if the property be ordered to be sold, that the value be computed, and only that value, less the present value of taxes and interest during the life in expectancy, be applied to the accretions, and that after applying the present value of such taxes and interest only, the remainder of the principal sum be paid out of the sale of the inheritance.

It does not appear that the defendants have applied to be subrogated as mortgages, or placed themselves in a position which entitled them to an assignment of the mortgage; nor was the question raised upon the trial as to the application of the interest and taxes. The plaintiff is entitled to the payment of the mortgage out of the real estate upon a sale thereof, and the question as to the disposition of the surplus, if any there be, does not arise upon this appeal.¹

All concur, except RAPALLO and TRACY, JJ., absent.

*Judgment affirmed.*²

¹ A portion of the opinion, not relating to the question under examination, is omitted.

² There is no dissent from the doctrine of the principal case, the apparent aberration of the Supreme

(d) *Mortgagee, how far a Trustee*

MANLOVE v. BALE

HIGH COURT OF CHANCERY, 1688

(2 Vern. 84)

ONE Bruton having a church-lease for three lives in 1664, conveyed and assigned it to the defendant Bale's father, in consideration of 550*l*. The conveyance was absolute. But Mr. Bale, the purchaser, by writing under his hand and seal, agreed that if Mr. Bruton, the vendor, should at the end of one year then next ensuing pay him six hundred pounds, that he would reconvey; the six hundred pounds was not paid, and two of the lives died, and the lease was twice renewed by the defendant Bale and his father; and now it was near twenty years after the first conveyance. Bruton being a prisoner in the Fleet, and indebted to the Warden for chamber-rent, assigns to him all his right, title, interest, equity and power of redemption; and thereupon the plaintiff Manlove, the Warden of the Fleet, brought his bill to redeem and to have an account of the rents and profits of the premises.

The defendant insisted on his title, and that the estate was not now redeemable, nor ought he to account for the profits.

But, notwithstanding, the MASTER OF THE ROLLS decreed a redemption on payment of the 550*l*. which was the first consideration money, as also the fines paid upon the renewal of the leases, which monies were to be paid with interest, and the account of profits was to commence but from the death of Peter Bale, who was the purchaser, and father of the defendant, and until that time the profits were to be set against the interest of the 550*l*. consideration money.¹

Court of Iowa in *Savage v. Scott*, 45 Iowa, 130 (1876), having been promptly corrected: *Barthell v. Syver-son*, 54 Iowa, 160, 164 (1880). The same result is reached in Kansas by statute. Gen. Stat. 1889, Ch. 107, § 148; *Standliff v. Norton*, 11 Kans. 218 (1873). That a mortgagee who has redeemed from tax sale is to be allowed only the amount of the taxes and not the amount paid by him for redemption, see *Moshier v. Norton*,

100 Ill. 63, 74 (1881). As to the position of mortgagee purchasing at tax sale, see *Dale v. McEvers*, 2 Cowen (N. Y.), 118 (1823); *Strong v. Burdick*, 52 Iowa, 630 (1879).

¹ "The mortgagee here doth but graft upon his stock and it shall be for the mortgagor's benefit."—*Per NOTTINGHAM, L. Ch.*, in *Rushworth's Case*, 2 Freem. 12 (1676).

"This additional term comes from the same old root, and is of the same

AMHURST v. DAWLING

HIGH COURT OF CHANCERY, 1700

(2 Vern. 401)

THE defendant having mortgaged the manor of Thundersley, to which an advowson was appendant, to the plaintiff, who brought the bill to foreclose, the church became void; the defendant moved the court for an injunction to stay the proceedings in a *quare impedit* brought by the plaintiff.

Per Cur. Although the defendant Dawling hath no bill, yet being ready and offering to pay the principal, interest and costs, if the plaintiff will not accept his money, interest shall cease, and an injunction to stay proceedings in the *quare impedit*; for the mortgagee can make no profit by presenting to the church, nor can account for any value in respect thereof, to sink or lessen his debt, and the mortgagee therefore in that case, until a foreclosure, is but in the nature of a trustee for the mortgagor.

And the like order was made between Jory and Cox,¹ where the defendant had an injunction against the plaintiff to stay his presenting to a church, that became vacant pending the suit.²

HOLDRIDGE v. GILLESPIE

COURT OF CHANCERY OF NEW YORK, 1816

(2 Johns. Ch. 30)

THE plaintiff, being possessed of a lease from B. W. and others, of a farm of about 309 acres (parts of lots, 8, 9, and 10, in Crosby's manor), dated in November, 1806, for eleven years, subject to an annual rent of 75 dollars, on the 26th of May, 1808, assigned the

nature, subject to the same equity of redemption, else hardships might be brought upon mortgagors by the mortgagee's getting such additional terms more easily, as being possessed of one not expired, and by that means worming out and oppressing a poor mortgagor."—*Per Curiam* in *Rakestraw v. Brewer*, 2 P. Wms. 311 (1728). But see *Nesbitt v. Treden-*

nick, 1 Ball & B., 29, 46 (1808), and compare *Keech v. Sandford*, Sel. Cas. Ch. 61 (1726).

¹ Finch, Pre. Ch. 71. See, also, *Croft v. Powell*, Com. Rep. 609.

² And see, *Cholmondeley v. Clinton*, 2 Jac. & W. 1, 177 (1820); *Kirkwood v. Thompson*, 2 DeG., J. & S. 613 (1865).

lease to the defendant Thomas Gillespie. The assignment was absolute; but the assignee, at the same time, executed a defeasance, declaring that the assignment was made to secure a debt of 74 dollars and 12 cents, due from the plaintiff to Thomas Gillespie, with interest. Part of the land was cultivated and improved. In April, 1809, the defendant T. G. took possession of the improved part of the farm. On the 29th of August, 1809, the plaintiff and defendants entered into an agreement, under seal, by which the plaintiff acknowledged that he had received of the defendants 100 dollars, as a compensation for one-half of his improvements on the lot, and he gave up one-half of the premises to the defendant T. G.; and to secure to T. G. 75 dollars, with interest, together with what might afterwards become due to the defendants, the plaintiff gave up the lease to T. G. until the 75 dollars and interest, and moneys to become due, should be paid, and T. G. engaged to give the plaintiff a good lease for half the farm for eight years from the 1st of February, 1808, subject to the rents, &c.

The plaintiff averred in his bill that the 100 dollars was to be paid by the defendants to the lessors for rent; that after the first agreement he delivered T. B. G. produce of the farm to the amount of 300 dollars, and performed work and services to the amount of 150 dollars; that T. G. went into possession of part, and the defendants had received the profits for 4 years, at the rate of 180 dollars a year; and that a balance was due to him from the defendants; that the defendant T. G., after the first assignment, applied to the lessors, and surrendered up the lease to them, and took a new lease in his own name and assigned it over to T. B. G. The bill prayed for an injunction against an ejectment brought by the defendants, in 1814, to recover possession of part of the premises occupied by the plaintiff, &c.

The defendants admitted that no money was paid to the plaintiff, but that the 100 dollars previously paid by them for rent to the landlords, and for 28 dollars and 34 cents paid for a debt of the plaintiff, were agreed to be the consideration of the agreement of the 29th of August, 1809. That the defendants had previously paid the landlords the 100 dollars, but no acquittance or receipt was given to the plaintiff for the amount. That the defendant T. G. had been in possession since 1809, and made improvements, which were specified; had paid the rent and taxes for the whole farm for the last three years, and that the plaintiff had paid only one-third of the rent for the year 1809. That the plaintiff had never paid the 75 dollars, or interest, and that he owed the defend-

ant T. G. about 175 dollars, &c.; that the defendant occupied a small house and garden, and that the ejectment was brought for the house so occupied by the defendant T. G., but not for the cleared land.

THE CHANCELLOR [KENT]. The bill filed by the plaintiff is in the nature of a bill to redeem, and the plaintiff is entitled to redeem *the whole* of the premises contained in the lease, and to have the *entire* advantage of the new lease on such redemption. The renewed lease enures for the benefit of the mortgagor. According to the cases of *Manlove v. Bale*, and of *Rakestraw v. Brewer* (2 Vern. 84, 2 P. Wms. 511), the additional term comes from the same old root, and is subject to the same equity of redemption, otherwise hardship and oppression might be practised upon the mortgagor. It is analogous, in principle, to the case of a trustee holding a lease for the benefit of the *cestui que trust*. Courts of equity have said, that if he makes use of the influence which his situation enables him to exercise to get a new lease, he shall hold it for the benefit of the *cestui que trust*. (1 Dow. 269; 1 Ch. Cas. 191; 1 Bro. Ch. Cas. 198.) So, if a guardian takes a renewed lease for lives, the trust follows the actual interest of the infant, and goes to his heirs, or executor, as the case may be. (18 Vesey, 274.) Indeed, it is a general principle pervading the cases that if a mortgagee, executor, trustee, tenant for life, &c., who have a limited interest, gets an advantage by being in possession, "or behind the back" of the party interested in the subject, or by some contrivance in fraud, he shall not retain the same for his own benefit, but hold it in trust. (Lord Manners, in 1 Ball & Beatty, 46, 47; 2 Ball & Beatty, 290, 298.) The doctrine has been uniform from the decision of Lord Keeper Bridgman, above referred to, in 1 Ch. Cas. 191, down to the most recent decisions. Nor do I think that the agreement of August, 1809, ought to form an obstacle to the redemption of the whole. That agreement bears the mark of undue influence growing out of the first assignment; and contracts of that kind, made with the mortgagor, to lessen or embarrass the right of redemption, are regarded with jealousy, as they are very apt to take their rise in unconscientious advantages assumed over the necessities of the mortgagor. (1 Vern. 8; 2 Vern. 520; 2 Atk. 495; 2 Ball & Beatty, 278.) The general principle is, "once a mortgage always a mortgage;" and though, no doubt, the equity of redemption may be released upon fair terms, yet the fairness and value must distinctly appear. In this case there was no satisfactory consideration for an

abandonment by the plaintiff of one-half of his farm. The agreement was false on its face, for the consideration was not paid. A payment of the annual rent to the landlord was no compensation to the plaintiff for half of his farm; and if we can credit the subsequent declarations of the defendants, they regarded the *whole* farm as still subject to redemption. But without placing reliance on sayings of this kind, the paper itself, accompanied with the admission that the consideration was never paid to the plaintiff, is enough to justify me in not regarding that agreement as a valid obstacle to the original right of redemption.

I shall, therefore, direct a reference to a master to take and state an account between the parties, in which the plaintiff is to be charged with the 74 dollars and 12 cents mentioned in the original defeasance, with interest from that time, and is, likewise, to be charged with all sums of money justly due to the defendants for goods sold, or advances by them, or either of them, made to and for his use, and on his account; and that the plaintiff is to be credited with all payments made, or articles of produce delivered, or work, labor, and services rendered to the defendants, or either of them; and that the defendants are to be charged with the net yearly value of the premises possessed by them, or either of them, during the time of their possession, after deducting the rent and taxes accruing and paid during that period; and that the pleadings and proofs taken in the cause be received as evidence before the Master, and that the question of costs and all other questions be reserved until the coming in of the report.

Decree accordingly.

HYNDMAN v. HYNDMAN

SUPREME COURT OF VERMONT, 1845

(19 Vt. 9.)

APPEAL from the Court of Chancery.

In 1832 the orator, being indebted to the defendant and William Hyndman, executed to them an absolute deed of his farm in Barnet and received back a writing of defeasance. The orator received farther advances from time to time, until 1836, when the parties reckoned together the amount due and found it to be \$608.69, and then agreed that the defendant and William Hyndman should have the farm, free from the orator's equity of redemption, at eight

hundred dollars; and the defendant accordingly surrendered to the orator the notes due from him and executed to the orator a note for \$191.31, and the orator surrendered his writing of defeasance; but it was at the same time verbally agreed between them that the defendant should sell the farm and the orator should have what was received therefor, above the sum of eight hundred dollars, after paying the defendant for his time and trouble in the business. The orator continued to reside on the premises until the commencement of this suit; and the defendant, subsequent to 1836, leased the premises from year to year to different persons and received the rent, until March 30, 1840, when the parties executed an indenture, in which it was recited that the defendant and William Hyndman had paid to the orator \$869.80, as of the date of March 11, 1840, in consideration of which they held a warrantee deed of the premises in question; and it was agreed that the orator should have the use of the farm for one year for the rent of \$78.09 that if he paid the rent and the sum of \$869.80 before March 11, 1841, he should have a deed of the farm, but that if he did not make payment, the defendant should sell the farm at auction on the first day of April, 1841, and should pay to the orator what was received for the farm, above those sums, after paying defendant for his time and trouble. The defendant caused the farm to be sold at auction in 1841 and became the purchaser himself at \$1001.00, and offered to pay to the orator the surplus above the sums specified in the indenture; but the orator would not receive it. Testimony was given tending to prove that the orator was poor, and that the farm was worth \$1100, or \$1200. William Hyndman conveyed his interest in the premises to the defendant before the commencement of this suit.

The orator prayed that an account might be taken of the amount justly due to the defendant, and of the rents and profits of the premises received by the defendant, and that the orator might be permitted to redeem the premises.

The Court of Chancery, REDFIELD, Ch., dismissed the bill with costs from which decree the orator appealed.

REDFIELD, J. The points of law here decided are, that when the orator contracted to sell out his equity of redemption to his mortgagee, he is, in this court, entitled to very favorable consideration, on account of the unequal relations in which the parties stood at the time. The one was the superior and the other the dependent. The one had power and resources; the other had neither, but was sore pressed by necessity. In addition to this, the defendant was

clearly the mortgagee of the premises for such a sum as it was not in the power of the orator readily to raise. The price was little more than two-thirds the value of the premises. It was agreed that the defendant should sell the premises, and if they brought more than the price paid by the defendant, the plaintiff should have the surplus. Under these circumstances we think the contract must, in equity, still be considered a mortgage, with a power of sale in the mortgagee. It is well settled that in all transactions between the mortgagor and mortgagee the conduct of the mortgagee will be watched very narrowly (4 Kent, 143, and note, and cases there cited). This is the language of all the cases, and of all the books, in regard to all purchases made by trustees of the interest of the *cestui que trust*. Such contracts are not positively disregarded in a court of equity; but they are viewed suspiciously and criticised with some degree of severity.

The only other ground upon which the defendant claims to hold the estate free from the plaintiff's equity of redemption is, that in pursuance of the power of sale, he caused the estate to be sold at auction *and became himself the purchaser*. Such sales have always in the English chancery, and in this country, unless when the matter is controlled by statute, been held voidable, at the election of the mortgagor, or *cestui que trust*, unless he delay for an unreasonable time to make his election, in which case he will be held to have confirmed the sale by his acquiescence.¹ The cases are too numerous upon this point, and there is too little conflict in the decisions, to require an elaborate review of the subject.

The State of New York, by *statute*, allows the mortgagee, in such cases, to become the purchaser, if he conduct the matter with perfect fairness. In that State, therefore, the decisions upon this subject rest upon a somewhat different basis from the English cases. In the former the sale is *prima facie* good, and it is, therefore, incumbent upon the *cestui que trust* to impeach its fairness; but in the latter the sale is always either good or bad, at the election of the *cestui que trust*,—as in the case of a contract of sale between an infant and an adult. The authorities will be found sufficiently referred to and digested in *Davoue v. Fanning*, 2 Johns. Ch. R. 252, and in Mr. Sumner's note to *Whichcote v. Lawrence*, 5 Ves. 740. *Bergen v. Bennett*, 1 Caine, 1, is somewhat of an elaborate case upon this point.

¹ That an unreasonable delay is fatal to the right, see *Learned v. Foster*, 117 Mass. 365 (1875). For the effect of a transfer to a *bona fide* purchaser, see *Burns v. Thayer*, 115 Mass. 89 (1874).

The decree of the Chancellor is, therefore, reversed and the cause remanded to the Court of Chancery to be there proceeded with.¹

WILLIAMS v. TOWNSEND

COURT OF APPEALS OF NEW YORK, 1865

(31 N. Y. 411)

THIS was an action to enjoin the sale of mortgaged premises under a statutory foreclosure.

The plaintiff executed to the defendant's assignor his bond and a mortgage of premises situated in Buffalo, dated the 8th day of February, 1853, to secure the payment of \$2,640, in ten years from the date thereof with annual interest, which mortgage contained a further condition in these words: "and shall also pay all assessments, taxes and charges on the said premises to be charged on the same, and in case of default in paying the same, the said parties of the second part and their representatives may discharge such assessments, taxes and charges, and collect the same with interest from the time of such payment under this mortgage, in the manner particularly specified in the condition of a certain bond or obligation bearing even date herewith, &c." The condition of the bond, so far as it relates to the question in this case, was in these words: "and shall also pay all assessments, taxes and charges on the premises described in the mortgage bearing even date herewith and collateral hereto, and in case of any default in paying the same, the said " (obligees) "may discharge said assessments, taxes and charges, and collect the same with interest from the time of payment as part of this bond, and the said mortgage." The mortgage contained a power of sale, providing that if default should be made in the payment of all or any part of the said principal sum of \$2,640,

¹ *Slee v. Manhattan Co.*, 1 Paige (N. Y.), 48 (1828); *Benham v. Rowe*, 2 Cal. 387 (1852); *Mapps v. Sharpe*, 32 Ill. 13 (1863); *Garland v. Watson*, 74 Ala. 323 (1883), accord. Compare *Montague v. Dawes*, 14 Allen (Mass.), 369 (1867), and *Fair v. Brown*, 40 Iowa, 209 (1875). See *The Howards v. Davis*, 6 Tex. 174 (1851); *Trimm v. Marsh*, 54 N. Y. 599 (1874), s. c.,

page 271, *supra*, and New York Code Civ. Pro., § 2394, for the contrary doctrine. The New York Code section reads as follows: "The mortgagee, or his assignee, or the legal representative of either, may, fairly and in good faith, purchase the mortgaged property, or any part thereof, at the sale."

"or to the assessments, taxes and charges as aforesaid, or of the interest thereof, at the time or times when the same ought to be paid," then and in such case the mortgagees were empowered to sell the premises at public vendue, &c. "And out of the moneys arising from such sale or sales, to keep and retain in their hands the said sum of two thousand six hundred and forty dollars, together with such assessments, taxes and charges as shall have been paid by them, together with all costs, charges and expenses, on account of such sale or sales."

In 1856 the city of Buffalo assessed upon the said mortgaged premises taxes amounting to thirty-three dollars and sixty-six cents for which the premises were sold at auction by the comptroller of said city on the 27th day of May, 1857, for taxes, interest and expenses, then amounting to \$36.75. The premises were bid off by one M. E. Viele for the term of five hundred years, and certificates pursuant to the provisions of the charter of said city were issued to him by said comptroller, in his name. Viele was, in fact, the agent of the defendant, who was then the assignee of the mortgage, and bid off the said premises for her, taking the certificates in his own name, as he testified, "for convenience of transfer."

On the 1st of August, 1857, the defendant, by her attorneys, commenced a foreclosure under the statute by advertisement in one of the Buffalo papers, which advertisement properly described said mortgage, &c., and claimed to be due thereon "\$2640 and interest thereon from February 8, 1857; and also the sum of \$36.75, with interest thereon from March 27, 1857." There was, in fact, no part of the principal of said mortgage or of interest thereon then due and unpaid. Before the day of sale mentioned in said advertisement the plaintiff paid to the comptroller of the city of Buffalo the amount legally necessary to redeem the premises from such tax sale; and defendant refusing to discontinue the proceedings of foreclosure, the plaintiff commenced this action to restrain her from selling said premises.

The court at Special Term held as a question of law "that the purchase by the defendant at the tax sale, and the taking and holding by her of the tax certificate, did not discharge the assessment, taxes or charges for which said premises had been sold at such sale;" and that "the defendant was not entitled to enforce the repayment of the amount paid on such purchase as a part of the condition of said mortgage," and ordered judgment for the plaintiff.

The judgment was affirmed by the General Term of the 8th District.

DAVIS, J. By the condition of the bond and mortgage the defendant undoubtedly had a right, after failure by the plaintiff to pay the taxes assessed on the mortgage premises, to pay and discharge the same, and thereupon to collect the amount so paid by suit upon the bond or by foreclosure of the mortgage. And the principal question in this case is, whether the purchase of the premises at the tax sales and the taking certificates of such purchase under the provisions of the charter of Buffalo, were a discharge of the assessments and taxes, within the true construction of the bond and mortgage.

By section 20 of title 5 of the charter of the city of Buffalo, as revised by the Laws of 1856, it is provided that the owner of any real estate sold for taxes may at any time before a declaration of sale is granted, as elsewhere provided by the charter, redeem the same by paying to the city treasurer, for the benefit of the holder of such certificate, the amount paid by him with the addition of fifteen per cent. per annum on such amount.

The certificates are transferable; and it cannot always be easily ascertained who the holder is. Hence the statute has provided that the redemption may be made by payment to the city treasurer. In all cases of sales for taxes the owner of the land is clothed by law with this right of redemption; and the tax, together with the expenses of the sale, remain a lien on the premises assessed, with an addition thereto of fifteen per cent., until the redemption or payment to the treasurer is made. The effect of the sale is therefore merely an assignment of the lien of the tax and the expenses then incurred, enhanced by the additional percentage; and this lien continues till the owner of the land makes the redemption, or the holder of the certificate takes title to the property in the prescribed form. It is therefore clear that the tax or assessment is not discharged by the sale and certificate. In this case the purchase at the tax sale was made by M. E. Viele, and the certificates of the comptroller were made to him, as he says, "for convenience of transfer." He was in fact the agent of defendant, but there was nothing in the manner of sale or form of the certificate to indicate that fact. The legal rights of the parties are perhaps the same as though the certificate had been made to the defendant; but it would certainly be very embarrassing to titles of real estate if the owner's right of redemption were dependent upon some undisclosed relation of agency between the apparent purchaser and the incumbrancer of the land. There would be no safety for him if he were not allowed to redeem; because the ostensible purchaser could

transfer the certificate to a *bona fide* holder and subject him to great embarrassment and perhaps to the loss of his land. A mortgagee who desires to pay off taxes or assessments and charge them on the mortgaged premises has a very plain course to pursue. At any stage of the proceedings he can step forward in his character of mortgagee and pay the assessment or redeem from a sale before the purchaser's title has actually ripened by a conveyance under the law. It is no hardship to require him to do this in a plain and distinct manner, so as not to embarrass the title of the mortgagor or owner. When, however, he purchases at a tax sale and takes a certificate as purchaser, that is an election on his part to occupy the relation of purchaser, with all the rights and incidents which the law attaches to it. He becomes then the owner of an undischarged lien, which the owner of the land may discharge in the manner provided by law.

But it is insisted that the purchase and taking of the certificate by a mortgagee, who has the right by the terms of his mortgage, or under the general statute, to pay off taxes and add the amount so paid to the lien of his mortgage, is by operation of law, *ipso facto*, an extinguishment and discharge of the tax. To support this proposition the familiar principle that a person who is placed in a situation of trust or confidence in reference to the subject of the sale, or has a duty to perform which is inconsistent with the character of a purchaser, cannot be a purchaser on his own account. (*Torrey v. The Bank of Orleans*, 7 Paige, 649; *Van Epps v. Van Epps*, 9 Paige, 257; *Burhans v. Van Zandt*, 3 Seld. 523.)

But this principle has never been carried so far as to prevent a junior mortgagee from purchasing the subject matter of the mortgage at a sale under a prior lien; nor has it been held that a title fairly purchased at such sale was held for the benefit of the mortgagor. A mortgage is a mere security for a debt; and there is no such relation of trust or confidence between the maker and holder of a mortgage as prevents the latter from acquiring title to its subject matter, either under his own or any other valid lien. The defendant had no duty to perform to the plaintiff or toward the mortgaged premises that precluded her from buying at the tax sale. She was under no obligation to pay the taxes. The plaintiff had covenanted that she might do so at her option, and thereby acquire certain rights; but she had not undertaken to do it nor subjected herself to any burthen or obligation whatever in respect to the assessments or taxes. She might pay them or not, as she chose, or she might stand upon her general rights and purchase at

the tax sale, as others could do, for the purposes of investment or protection. But if this were not so, all that the principle sought to be invoked would require is that as purchaser she should take a redeemable interest only which never could ripen as against the mortgagor into a greater one, and not that the lien she purchased should be discharged or extinguished, leaving her to no remedy except the possibly inadequate one under the covenants of the bond and mortgage. It is my opinion, therefore, that the purchase at the tax sale did not operate to discharge the assessment and deprive the plaintiff of his right of redemption under the statute.

But it is urged that the failure of plaintiff to pay the tax was a breach of the condition of the mortgage, and gave defendant a right to foreclose and collect the whole amount secured. There is no clause of the mortgage making the whole sum due on failure to pay the interest, or on breach of any condition. The clause which authorizes the retention by the mortgagee of the whole amount secured after a sale of the premises does not have the effect claimed for it; nor do I think it would countervail the provision of the statute which requires a sale in parcels, when that is practicable, and prohibits a sale of more than sufficient to pay the amount actually due with the expenses of sale. (3 R. S., 5th ed., p. 860, § 6.) But no right to foreclose would accrue upon a simple failure of the mortgagor to pay the taxes; to give that right it is essential that the holder of the mortgage shall have paid off and discharged the assessment or tax, otherwise no money has become due which the mortgagee is entitled to retain on a sale. The language of the mortgage settles this, for it provides that "*such assessments, taxes and charges as shall have been paid by them*" may be retained.

Besides, in my judgment, a mere naked breach of such a covenant in the condition of a mortgage, without the payment of any amount, would give no right to commence a foreclosure under the statute; but this it is not necessary to determine.

I think the judgment should be affirmed.

Judgment affirmed.

TEN EYCK *v.* CRAIG

COURT OF APPEALS OF NEW YORK, 1875

(62 N. Y. 406)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department reversing a judgment in favor of plaintiff entered upon a decision of the court upon trial without a jury. (Reported below, 2 Hun., 452; 5 T. & C., 65.)

This action was brought to redeem certain real estate known as "Congress Hall," in the city of Rochester, from incumbrances held by the defendants as executors of the estate of John Craig, deceased, and for an accounting of the rents and profits.

The facts as found by the trial court are substantially as follows:

On the 23d of April, 1860, Nelson P. Stewart, then being the owner in fee of the premises, executed a mortgage thereon, and on a farm in Erie county, to the defendant John Craig, to indemnify him for becoming Stewart's surety in an undertaking made to stay proceedings on a judgment recovered in the Supreme Court on the 24th day of October, 1859, in favor of Maria L. Dehon, executrix, against Stewart, for \$10,184.83, on an appeal taken by Stewart from said judgment. At the time of the execution of said mortgage said Congress Hall property was subject to three prior mortgages, amounting to about \$19,000, two of which were then owned by the defendant Craig, and the third by Asa Sprague, who subsequently transferred it to Craig. The said property was also subject, at the time of the execution of said indemnity mortgage, to a lease executed by Stewart to Robert D. Cook, for the term of five years from the 1st day of May, 1860, at a rent of \$3600 a year, payable monthly in advance. On the 24th of April, 1860, Stewart assigned said lease and the rents payable thereon to Craig, as further indemnity for his becoming surety as above stated, by an instrument in writing.¹

Craig was made liable as surety, and was compelled to and did pay \$12,301.24 on said undertaking on the 7th of August, 1862. Craig foreclosed his indemnity mortgage, so far as it related to the property in Erie county, and realized therefrom the sum of \$2615.88. At the time when Craig signed said undertaking, and took said indemnity, said Congress Hall property was subject to a

¹ The assignment is omitted.

judgment theretofore recovered in the Supreme Court in favor of the Madison County Bank, or the trustees thereof, against Stewart, for the sum of \$2500 and costs, of the existence of which judgment Craig was ignorant at the time. On being informed of it he refused to justify as a surety to said undertaking, unless he was indemnified against said judgment, and therefore Stewart executed a bond, dated the 1st day of June, 1860, and procured the same to be executed by George K. Johnson and the defendant Elisha C. Litchfield, as his sureties, in the penal sum of \$5000, conditioned to protect said Congress Hall property against the judgment last above mentioned, which bond was delivered to Craig, and he then justified as surety to the undertaking given on appeal. On the 5th day of December, 1863, Craig recovered a judgment on said last mentioned bond against Litchfield for \$5179.69, which judgment Litchfield paid to Craig. On the 17th of December, 1860, the Congress Hall property was sold on an execution issued upon said judgment in favor of the Madison County Bank, and was bid off at such sale by the defendant Craig for the sum of five dollars. On the 17th of March, 1862, Daniel W. Powers, by virtue of a judgment recovered by him against Stewart on the 26th of January, 1860, for \$1481.78, redeemed the Congress Hall property from said sale, and on the 21st of March, 1862, the sheriff, in completion of such sale, executed a deed of said property to Powers. On the 7th of May, 1864, Powers, by deed of that date, conveyed said property to the defendant Craig, in consideration of the sum of \$1753.53 paid by Craig. The judgment under which Powers redeemed had been sold and assigned by him before the redemption, and on the 10th of April, 1860, to Oliver M. Benedict, of Rochester, in consideration of the amount then due on the judgment, paid by Benedict to Powers at the time. On the day of the redemption, to wit, the 17th of March, 1862, Benedict reassigned the judgment to Powers, without any valuable or valid consideration. At the time of each of those assignments, and for several years next preceding that time, Benedict was the attorney of Stewart, and was his confidential adviser. He purchased said judgment and took the assignment of it in his own name, at the request of Stewart. And the money which he paid for it to Powers was furnished by Stewart, or was replaced by him immediately after such payment, in pursuance of an arrangement between him and Benedict made before the money was paid by Benedict. There is no evidence that the assignment of the judgment from Benedict to Powers was authorized by Stewart or that he knew of it. Craig, when he took the deed

from Powers, had knowledge of the facts as to the relations between Benedict and Stewart, and as to the assignment of the judgments.

On the 27th of April, 1860, Stewart and his wife conveyed "Congress Hall" to Henry K. Sanger, by deed, subject to the several mortgages above stated, except the indemnity mortgage. Sanger died previous to July, 1864, leaving a will by which he gave to his wife all his estate, real and personal, and named her as sole executor. She, as devisee and executrix, conveyed Congress Hall to the plaintiff Henry Ten Eyck, by deed dated 3d of January, 1867.

On these facts the court decided as matter of law, among other things, that the defendant Craig, on entering upon the collection of the rents on the assignment of the lease of the Congress Hall property, was in the position of a trustee for Stewart, in respect to the leased property, and his purchase of the same while he occupied that position inured to the benefit of the *cestui que trust*, at his election. That when Benedict held the judgment under which Powers redeemed, he held it in trust for Stewart. Powers, as the assignee of Benedict, without consideration, took Benedict's right in the judgment and no more. When Powers redeemed he took the land subject to the trust which attached previously to the judgment in his hands. That Craig was chargeable with notice of said trust. That Stewart, while he owned the Congress Hall property, had the right to redeem the same, on paying to Craig the amount of his liens and advances, over and above his receipts. That the plaintiff Ten Eyck, by means of the successive conveyances above stated, has succeeded to such right of Stewart to redeem said property, and is entitled to redeem.

ANDREWS, J. . . . It will be convenient in examining the questions which arise in the case to leave out of view for the present the facts relied upon as establishing a trust relation between Craig and Stewart, which disabled Craig from acquiring a title to the property hostile or adverse to Stewart or his grantee, and to consider the position of Sanger and his relation to the property after the sale and conveyance by the sheriff, upon the assumption that Craig as purchaser on the sale and the grantee of the redemption title was unaffected by any special disability, and acquired the same rights through the sale and the subsequent proceedings as if at the time of the purchase he had been a stranger to Stewart and Sanger, owing them no duty and bound by no obligation to protect the equity of redemption. It is not claimed that there was any fraud or irregularity in the sale of the bank judgment. The

judgment was unpaid; the sale was open and fair, and so far as appears was not procured by the intervention of Craig. The sum bid, so far as appears, was at the time the full value of the interest of Sanger in the property. There is nothing which in any manner tends to impeach the *bona fides* of the sale. It is claimed, however, that the redemption was void, on the ground that the judgment under which it was made had been paid by Stewart, the judgment debtor, before the redemption, and was not at the time a lien upon the land.¹

The next and principal question to be considered is, whether Craig, at the time of the sale, occupied such a relation to the property, or to Stewart or Sanger, that he was disabled from purchasing for his own benefit, and claiming the title adversely to them. If he occupied that relation, he cannot set up any right acquired as purchaser on the sheriff's sale in bar of their right to redeem. Purchases by trustees, or persons occupying fiduciary positions, in contravention of their trust or duty, are held in equity to be made for the benefit of the *cestui que trust*, at his election. No irredeemable title can be acquired upon such a purchase. And if the purchase by Craig was within the principle which prohibits a purchase by a trustee, it is an immaterial circumstance that the time within which a statutory redemption might have been made has expired. The right of redemption exists in favor of the *cestui que trust* and those in privity with him, independently of the statute, upon general principles of equity, and may be enforced at any time within the period allowed by the statute of limitations, or the rule of courts of equity regulating the jurisdiction.

The rule which prohibits a trustee from purchasing the property of a *cestui que trust* stands upon the proposition stated by the chancellor in *Whichcote v. Lawrence*, 3 Ves. 740, that one who undertakes to act for another in any matter shall not in the same matter act for himself. It applies in all cases where the duty which the trustee has to perform in respect to the property is inconsistent with his becoming a purchaser for his own use. And the purchase will not be allowed to stand, although the court may not be able to discover any wrong intention on the part of the trustee, or that he has gained any advantage in the transaction. The rule is inflexible, that he shall not place himself in a position where his interest is or may be in conflict with his duty.

¹ The discussion of this point is omitted. The learned judge reaches the conclusion that no right of re-

demption remains in Stewart or his grantees.

It is claimed that Craig was disabled from purchasing the Congress Hall property at the sheriff's sale, and holding it adversely to Stewart and Sanger, under the rule just adverted to. There are two grounds upon which this claim is based: First, that Craig at the time was mortgagee in possession; and, second, that the relation of trustee and *cestui que trust*, in respect to the property, was created between Craig and Stewart by the instrument of April 24, 1860, which precluded him from purchasing for himself, or otherwise than as a trustee for Stewart, or his grantee. Assuming that the learned counsel for the plaintiff is correct in the position that Craig, at the time of the sheriff's sale, stood, in relation to the premises, in the character of mortgagee in possession, the question arises, whether a mortgagee in possession can buy the mortgagor's title on an execution sale, upon a judgment in favor of a third person against the mortgagor, and set up a title under the sale, as a defence to an action by the mortgagor to redeem. Another mode of stating the question is: Is a mortgage in possession a trustee for the mortgagor, so that he will not be allowed to buy in the equity of redemption on a sale upon an independent lien held by a third person?

Unless the mortgagee in possession is a trustee for the mortgagor, there is no ground upon which he can be precluded from purchasing. It is clear that no trust relation between the mortgagor and mortgagee is created by the execution of the mortgage, unaccompanied by possession. The mortgage under our law is a security merely. The mortgagee has, by virtue of his mortgage, no estate in or title to the land, or the right of possession, before or after the mortgage debt becomes due. He owes the mortgagor no duty to protect the equity of redemption. The power of sale which usually accompanies a mortgage is given to enable him, by an adverse proceeding, to sell the equity of redemption for the payment of the mortgage debt. The objection that he could not become the purchaser at his own sale under the power has been removed by the statute when the foreclosure is by advertisement (2 R. S. 546, § 7); and a provision is inserted in every decree for the sale of mortgaged premises, unless otherwise specially ordered, that the plaintiff may become the purchaser. (Rule 73.) And he may buy in any outstanding title and hold it against the mortgagor. (*Cameron v. Irwin*, 5 Hill, 280; *Williams v. Townsend*, 31 N. Y. 415; *Shaw v. Bunny*, 13 Week. R. 374; s. c., 2 De G., J. & S. 468.)

There is, in truth, no relation analogous to that of trustee and

cestui que trust between the mortgagor and mortgagee created by the execution of the mortgage. The mortgagee is not a trustee of the legal title, because, under our law, he has no title whatever. (*Kortright v. Cady*, 21 N. Y. 342, and cases cited.) He may deal with the mortgagor, in respect to the mortgaged estate, upon the same footing as any other person; he may buy in incumbrances for less than their face, and hold them against the mortgagor for the full amount; he may do what any other person may do, and his acts are not subject to impeachment, simply because he is mortgagee. (*Darcy v. Hall*, 1 Vern. 48; *Knight v. Majoribanks*, 2 Mac N. & G. 10; *Chambers v. Waters*, 3 Sim. 42; 3 Sug. on V. and P. 227.)

Nor is the mortgagee converted into a trustee by taking possession as mortgagee of the mortgaged property, so as, in general, to prevent his purchasing an outstanding title, or under another lien. Under the English law he has the right to the possession, because he has the legal title to the land. Under our law he cannot obtain possession until foreclosure, except by the consent of the mortgagor, because until that time he has no title. A mortgagee is often called a trustee, and in a very limited sense this character may be attributed to him. There may be a duty resting upon a mortgagee in possession to discharge a particular claim against the land. If in such a case he omits to do it, and allows the land to be sold on such a claim, and becomes the purchaser, he would hold the title in trust for the mortgagor. A mortgagee in possession is allowed, and it may be his duty to pay taxes on the land out of the rents and profits. If he suffers the land to be sold for taxes in violation of his duty, and purchases on the sale, he would upon general principles be deemed to hold the title as trustee. So, if a mortgagee is allowed to take possession and undertakes to pay the interest on other liens out of the rents and profits and fails to do so, he could not purchase the land for his own benefit in hostility to the mortgagor on a foreclosure of an incumbrance for non-payment of interest which he was bound to pay. A mortgagee in possession is bound to account for the rents and profits; and in that respect, as was said by Shaw, C. J., in *King v. Insurance Co.*, 7 Cush. 7, he may be denominated a trustee. But, except in some special sense, that is not the relation he bears to the mortgagor. The relation of mortgagor and mortgagee is explained in the admirable judgment of Sir Thomas Plumer, in the leading case of *Cholmondeley v. Lord Clinton*, 2 Jac. & Walk. 183. He says: "It is only in a secondary point of view and under certain circumstances, and for a particular

purpose that the character of a trustee constructively belongs to a mortgagee. No trust is expressed in the contract; it is only raised by implication in subordination to the main purpose of it, and after that is fully satisfied its primary character is not fiduciary." And again: "The mortgagee when he takes possession is not acting as a trustee, but independently and adversely for his own benefit." A mortgagee in possession may purchase from a prior mortgagee and get an irredeemable title. (*Kirkwood v. Thompson*, 2 De G., J. & S. 613, and cases cited; *Parkinson v. Hanbury*, 2 D. & S. 143; s. c., 2 De G. & S. 450; see, also, *Shaw v. Bunny*, *supra*; *Knight v. Marjoribanks*, *supra*.) Lord Cranworth, in *Kirkwood v. Thompson*, referring to the fact that the mortgagee at the time of the purchase was in possession, says: "That makes no difference; being in possession could only make a difference if it created an obligation between the mortgagee and mortgagor, which would not have existed if he had not been in possession. Nothing of this sort is suggested; no duty arises on being in possession except to account in a way onerous to the mortgagee."

A mortgagee in possession is sometimes spoken of as a tenant and as having the legal rights of a tenant. (2 Wash. 150.) The analogy is not very close between the two relations; but it is difficult to see any reason for denying the right of a mortgagee to purchase and hold adversely to the mortgagor in a case when a tenant in possession would be allowed to purchase and hold against the landlord; and yet a tenant may purchase the demised premises on a sale on execution against the landlord, and when his title is perfected, may set it up in bar of a recovery for rent thereafter accruing on the lease. (*Nellis v. Lathrop*, 22 Wend. 121.)

The first ground stated upon which it is claimed that Craig was disabled from purchasing on the sheriff's sale, viz., that he was the mortgagee in possession, cannot, I think, be supported; and it remains to consider whether such disability existed by reason of the agreement of April 24, 1860. The purpose of that agreement was to secure Craig for becoming surety for Stewart on the undertaking on the appeal from the Dehon judgment. This purpose is recited in the instrument. The object was the protection of Craig; and if any trust in favor of Stewart resulted from the provisions of the instrument it was incidental and collateral to its primary intent.¹

I am unable to discover any duty arising out of the contract of April 24, 1860, or the circumstances resting upon Craig which debarred him from purchasing, on his own account, on the execution

¹ This part of the opinion is omitted.

sale. He was, in some sense, a trustee of the rents received under the arrangement, and was bound to dispose of them as required by the agreement, and this was the extent of his duty. He was not bound to protect Stewart against the loss of the rents through a sale of the land on the bank judgment. If a mortgagee in possession may purchase for himself on a foreclosure of another mortgage, or buy in an outstanding title, then *a fortiori* could a person in the position of Craig. The mortgagee under the English law has the entire legal title, and so far as he is regarded as trustee, the trust is the whole interest of the mortgagor. Craig at most was a trustee of the rents for a term only. He had by the agreement no interest as trustee or otherwise in the fee which he purchased on the execution sale.

The conclusion which I have reached is adverse to the existence either in Stewart or Sanger of a right to redeem, and it becomes unnecessary to consider whether, assuming such right to exist, the plaintiff, as grantee of Mrs. Sanger, succeeded to it. The rule which avoids purchases made in violation of his duty at the election of the *cestui que trust* is a valuable one and ought not to be impaired by engrafting upon it exceptions, or indulging in subtle refinements and distinctions to withdraw a particular case out of its influence. But after careful consideration, I am unable to perceive that the facts of this case bring it within the rule, and am therefore of opinion that the order should be affirmed, and judgment absolute given for defendants, pursuant to stipulation, with costs.

All concur, except CHURCH, Ch. J., not voting. FOLGER, J., not sitting.

*Order affirmed, and judgment accordingly.*¹

¹The cases generally are accord. But see *Harrison v. Roberts*, 6 Fla. 711 (1856); *Walshall's Exrs. v. Rives*, 34 Ala. 92 (1859), and *Roberts v. Fleming*, 53 Ill. 196 (1870), *semble*, limiting the doctrine of the principal

case to a sale under a judgment of a third person having a lien paramount to that of the mortgage. Compare *Griffin v. Marine Co.*, 52 Ill. 130 (1869).

HALL v. WESTCOTT

SUPREME COURT OF RHODE ISLAND, 1886

(15 R. I. 373)

BILL in equity to redeem a mortgage and for an account.

DURFEE, C. J. The bill states that on October 23, 1873, Walter J. Reynolds, being the owner of a lot in Providence, mortgaged it for \$800 to Stephen H. Williams; that subsequently the lot passed by mesne conveyances to Charles W. Adams, who, December 30, 1874, gave two mortgages thereon to Hiram C. Pierce, to wit, one for \$3250, and one for \$500, subject to the mortgage for \$3250; that the mortgage for \$3250, though taken solely in Pierce's name, belonged equally to him and the complainant Harriet Hall; that Pierce assigned the mortgage for \$3250 to the defendant Charles A. Westcott, who thereupon, January 23, 1875, gave the complainant Harriet Hall a writing in which he declared that he held said mortgage as to one-half in trust for her; that said Pierce subsequently assigned said mortgage for \$500, and his interest in said mortgage for \$3250 to said Harriet, and that said mortgage for \$500 contained a power of sale under which, in January, 1882, said Harriet duly sold the estate, buying it herself under notice as authorized by statute. The bill alleges that the defendant is in possession, and contains other allegations. It asks for an account and for leave to redeem. The defendant sets up several defences.¹

The third defence is that the mortgaged lot was sold for the non-payment of taxes, and bought by and conveyed to the defendant. This raises the question whether a mortgagee or his assignee, out of possession, can become a purchaser at a tax sale with the same effect, as against the mortgagor and other mortgagees, as if he were a stranger to the estate. There is some conflict of authority on this point. All the cases agree that there are persons who stand in such relations to the estate that they cannot purchase as if they were strangers. No person whose duty it is to pay the tax can be permitted to purchase at a sale for its non-payment, and acquire a good title as against others who are interested in the estate, since to permit him to do so would be to permit him to profit by his own default. Under this rule mortgagors, mortgagees in possession,

¹ The consideration of the first and second defenses is omitted.

life tenants, and tenants obligated by contract to pay the taxes, are incapacitated to become purchasers. The incapacity has likewise been held to extend to tenants in common, for, if the estate is sold for taxes to one of the tenants, it is sold for his default as well as for the default of his co-tenants. (*Page v. Webster*, 8 Mich. 263; *Butler v. Porter*, 13 Mich. 292; *Cooley v. Waterman*, 16 Mich. 366; *Cooley on Taxation*, 346, 347.) So a person who occupies a fiduciary relation as regards the estate, cannot purchase it for himself. The trust in the one-half of the mortgage for \$3250 is protected under this rule. And there are cases which enounce, or at least presuppose, a still broader doctrine, which may be stated thus, namely: that a purchaser who has an interest in the estate, such as would entitle him to redeem it if sold to another, will be presumed to have purchased it for the protection of that interest, or to save it from sacrifice, and will be required to hold it, even after the statutory period for redemption has expired, simply as security for his reimbursement. We find this doctrine nowhere more clearly asserted than in *Fair v. Brown*, 40 Iowa, 209. The defendant there was interested in the estate by judgment lien and as a second mortgagee. He bought certificates of sale for taxes, and subsequently took the tax deed. The court held that the prior mortgage was not defeated. "The land," says the court, "is a common fund for the payment of the plaintiff's," i. e., the prior mortgagee's, "mortgage and the defendant's liens. Defendant was authorized to redeem from the tax sale. Equity will not permit him to acquire the title for an inconsiderable sum when he was authorized to remove the trifling incumbrance by redemption. Though not bound to pay the tax, yet it was his right to do so to protect his liens. He cannot obtain that protection by pursuing a course that will deprive the mortgagee of his security, and leave the mortgagor to sustain the weight of the liens, which are personal judgments, after being deprived of his property by tax title. (*Garrettson v. Scofield*, 44 Iowa, 35; *Porter v. Lafferty*, 33 Iowa, 254; *Stears v. Hollenbeck*, 38 Iowa, 550.)" In *Middletown Savings Bank v. Bacharach*, 46 Conn. 571, the defendant, having had an undivided eighth of an estate subject to a mortgage set out to him under an execution, purchased the estate at a sale for taxes assessed before he became interested in it, and the court held that he could not set up the tax title to defeat the mortgage, he being entitled to redeem the mortgage, which yet he could not do, if the mortgagee had paid the taxes, without reimbursing him. The court also said that the mortgagee was similarly incapacitated.

tated, because he could pay the tax and add the amount of it to the mortgage debt. In *Connecticut Mut. Life Ins. Co. v. Bulte*, 45 Mich. 113, the court lays down the doctrine that where a mortgagee, or one of two or more mortgagees, purchases the estate at a tax sale, the purchase may be treated as payment. "It is as just and as politic here," says the court, "as it is in the case of tenants in common, to hold that the purchase is a payment of the tax." In the later case of *Maxfield v. Willey*, 46 Mich. 252, the court affirms the doctrine. "When the mortgagee," says the court, "instead of making payment of the taxes, makes a purchase of the land at tax sale, we have no doubt of the right of the mortgagor to have the purchase treated as a payment, and to compel the cancelment of the certificate or deed on refunding the amount paid with interest." The opinions in these cases were delivered by Judge Cooley, who, in the preparation of his book on Taxation, had occasion to make the subject a special study.

The most recent case which we have met with is *Woodbury v. Swan*, 59 N. H. 22, in which the Supreme Court of New Hampshire decided that the holder of a mortgage cannot defeat a prior mortgage by acquiring a tax title. The court rest their decision on the following reasons, as declared by Bingham, J., in delivering the opinion of the court: "Mortgagor and mortgagee have a unity of legal interest in the protection of their titles against sale for the non-payment of taxes, and against outstanding tax titles; and it is not equitable that either of them should act adversely to the other in the acquisition and use of such titles. Therefore the mortgage contract comprises an implied agreement that, while either party may buy a tax title for the preservation of his right in the mortgaged property, neither of them will buy a tax title for the extinguishment of the title, in the maintenance of which they, as well as partners and tenants in common, are in law jointly concerned. The common interest of these parties in the mortgaged property creates a relation of trust and confidence."

Other cases may be cited which support the same view, though not always for the same reasons. (*Moore v. Titman*, 44 Ill. 357; *Harkreader v. Clayton*, 56 Miss. 383; *Haskell v. Putnam*, 42 Me. 244; *Bassett v. Welch*, 22 Wisc. 175; *Whitney v. Gunderson*, 31 Wisc. 359, 379; *Chickering v. Failes*, 26 Ill. 507; *McLaughlin v. Green*, 48 Miss. 175.) In California it is held that a person who is under any obligation, either *moral* or *legal*, to pay the taxes, cannot become a purchaser. (*Moss v. Shear*, 25 Cal. 38; *Christy v. Fisher*, 58 Cal. 256.)

Other cases adopt a narrower view, and maintain that any person can become a purchaser who is not under any legal duty to pay the taxes. (*Williams v. Townsend*, 31 N. Y. 411; *Waterson v. Devoe*, 18 Kans. 223; *Bettison v. Budd*, 17 Ark. 546; *Ferguson v. Etter*, 21 Ark. 160.)

Our conclusion is that a mortgagee, either in possession or out of possession, is not entitled to purchase the estate at a tax sale, and set up the tax title as against the mortgagor or the other mortgagees. They all have a common interest in the preservation of the estate, and therefore, if either of them purchases the estate at a tax sale, it should be presumed in favor of the others that he made the purchase for the common protection.¹

We think a case is shown which entitles the complainants to relief.

¹*Schenck v. Kelley*, 88 Ind. 444 (1882), accord. Compare *Medley v. Elliott*, 62 Ill. 532 (1872).

CHAPTER III
EXTENSION OF MORTGAGE

VANHOUTEN *v.* McCARTY

COURT OF CHANCERY OF NEW JERSEY, 1842

(4 *N. J. Eq.* 141)

THE CHANCELLOR [PENNINGTON].¹ In 1836, during the rage for speculation in real estate, the complainant sold his farm, in the neighborhood of Paterson, to the defendant, John McCarty, for thirteen thousand dollars; the conveyance was made on the twenty-seventh of April, 1836, and, to secure so much of the consideration money, the defendant executed to the complainant a bond and mortgage, in the same day, for ten thousand eight hundred and twenty-two dollars and fifty cents, on the premises, payable in the following manner: one thousand dollars on the twenty-ninth of September, then next; two thousand dollars on the first of May, 1837, and the residue on the first of May, 1838, with interest from the first of May next after the date of the bond, payable on the first days of November and May in each year.

On the same day that McCarty got his deed, he conveyed the property to Kirk, Johnston and Copland, and they, under an agreement made by McCarty with Edward N. Rogers and John A. Stimler for a large advance, conveyed the property to them, by deed dated the twenty-fourth of September, 1836. Since the last deed, Edward N. Rogers and John A. Stimler have conveyed to Archibald G. Rogers, who has also conveyed to Nehemiah Rogers, in whom the equity of redemption now resides.

The bill is filed for the foreclosure and sale of these premises, under the mortgage made by McCarty to the complainant.

A decree *pro confesso* was taken against McCarty and wife, Edward N. Rogers and Stimler. Archibald Rogers and Nehemiah Rogers have filed separate answers, upon which the cause has been put at issue, and depositions taken.

¹ The opinion only is given.

The first ground of defence set up is that the transaction is usurious, and the bond and mortgage therefore void.¹

The next point taken arises from the object the purchasers had in buying this property. They intended to set it off in building lots, and Edward N. Rogers, who had agreed in his purchase with McCarty for five years for the payment of the money, after getting his deed, learned for the first time, from the complainant, that the bond and mortgage were payable at an earlier day; he expressed his surprise, and told the complainant that he should look to McCarty and those concerned with him to make good their agreement; when the complainant told the witness that he did not believe there would be any difficulty, as his great object was to get his interest; that the witness thereupon told complainant he would think over the subject and make him a proposition. The witness then says, that the same afternoon he called on the complainant, and told him he would make this agreement with him—that if he would extend the time of payment of the bond five years from the twenty-seventh of April ensuing its date, making six years in all, and release the lots that deponent and Stimler should sell from the lien of the mortgage (provided such release did not exceed one-fourth of the property) on his being paid for the property thus released, or having the bonds and mortgages given for their purchase money assigned to him, that complainant might retain the possession of the residue of the farm free of rent, and that no claim would be made for rent for the time he had already occupied it. This proposition, he says, was agreed to by the complainant.

The evidence then proceeds to show that the complainant is guilty of a breach of this agreement; and it is insisted by the answer that the defendant, Nehemiah Rogers, is entitled, before the complainant can have his decree in this cause, to a specific performance of the complainant's agreement to release lots as they should be sold on the premises, or to have his damages for such breach of his agreement set off against the amount of the bond and mortgage.

This is taking a wide range, and involving in a case of foreclosure of a mortgage a great variety of matters and endless litigation. If this defence should be sustained, I see no limit on a bill of foreclosure to settling before decree every agreement and controversy respecting the land between the complainant and all the inter-

¹ The discussion of this point is omitted. The learned Chancellor reaches the conclusion that the evi-

dence fails to establish a case of usury.

mediate owners down to and including the present, and that, too, whether the mortgage has any connection with them or not. This agreement is not made with the mortgagor, but with Edward N. Rogers, an intermediate owner, and is declared to have been entered into long after the mortgage was made, and for purposes connected with the property growing out of the manner in which sales were proposed to be made. The defendant must, in my opinion, be left on this agreement to his remedy at law. The complainant is able to refund in damages, as it is stated, for any amount in which he may be justly chargeable, and there is no safe mode in this court of settling questions of this character; it is properly a case for a jury to assess the damages, and not for investigation before this court. The evidence would lead me to believe that the complainant has not regarded, as he should have done, the position of men who had purchased property at so expensive a rate, and who had no way of remunerating themselves but by selling off lots; still, I do not see how the defendant can avail himself of such a defence in this action. Can this court decree a specific performance against the complainant of his agreement in this action? There is no precedent for such a course of practice, and to attempt to settle the damages incident to a breach of such an agreement would be equally against the course of procedure. I am, therefore, of opinion, that this defence cannot avail the defendant in this action.

The last objection is, that the time of payment for the principal was extended by the complainant for five years from the twenty-seventh of April, 1837, and the bond and mortgage will of course not be due until the twenty-seventh of April, 1842. This is clearly established, from the evidence, and the defendant is entitled to this time before payment can be demanded. Edward N. Rogers expressly so swears, and the whole evidence, as well as the statement in the complainant's bill, go to show such an understanding. It is well settled, that the time for payment may be extended by parol. (*Chitty on Contracts*, 27, in note; 1 *John. Cases*, 23; 3 *John.* 528; 2 *Wendell*, 587; 14 *John.* 330; 1 *Green*, 165; *Saxton*, 280.)¹

There must, therefore, be a reference to a master, to ascertain and report the amount due the complainant for interest on the bond and mortgage, after deducting a fair compensation for the use and occupation of the farm; and also, whether a part of the premises can be sold without material injury to the rest. The

¹ *Tompkins v. Tompkins*, 21 N. J. Eq. 338 (1871).

justice of this case, as far as I am able to reach it in this suit, as it appears to me, is to consider the time of payment for the principal of the bond enlarged to the twenty-seventh of April next, leaving the interest payable half yearly. The contract made for complainant's enjoying the possession free of rent, is part of the one for releasing a portion of the lands, subsequently made with Mr. Rogers, and must be settled with that.¹

DODGE v. CRANDALL

COURT OF APPEALS OF NEW YORK, 1864

(30 N. Y. 294)

APPEAL from a judgment of the Supreme Court.²

WRIGHT, J. The mortgage sought to be foreclosed by action was, in the winter of 1858-9, held by the administrator of S. V. R. Mallory, deceased. The premises covered by it had, after its execution, and about the 23d February, 1856, been conveyed by the mortgagor to the defendant Holcomb, who assumed the payment of the mortgage as a part of the purchase price of the premises. The mortgagor had paid the interest, and \$266.66 of the principal sum secured by it, before the sale and transfer of the premises to Holcomb. Afterwards Holcomb paid the interest. The whole principal became due and payable on the 1st March, 1858. Shortly before the 28th February, 1859 (the administrator of Mallory being about to foreclose the mortgage), Holcomb entered into an agreement with the plaintiff's testator, whereby the latter agreed to purchase the mortgage of Mallory's administrator, who then held the same, and extend the time of payment five years, or give that additional time from the time he took the assignment, to pay the balance due upon the bond and mortgage; in consideration of which, Holcomb agreed to pay him fifty dollars, which he did pay, and Holberton took the assignment of the mortgage, and continued to hold the same, and receive payments of interest thereon up to

¹ See also, *Van Syckel v. O'Hearn*, 50 N. J. Eq. 173 (1892), where BIRD, V. C., said: "The complainants say that the obligation being in writing and under seal, the time for the performance thereof cannot be enlarged

by a parol agreement. I think all of the authorities, in this State at least, hold the time for performance of every such contract may be extended by parol."

² The statement of facts is omitted.

his death. The bond and mortgage were assigned to the plaintiff's testator on 28th February, 1859, and the time agreed to be given to Holcomb to make payment would not expire until the 28th February, 1864.

This foreclosure suit was brought in June, 1862, and the question is whether the executor of Holberton is entitled to sustain it, notwithstanding the contract of his testator to purchase the mortgage, and forbear foreclosing it for five years; or, in other words, to extend the time of payment of the debt secured to be paid by it, and which was due, for five years from such purchase. If Holberton, in the face of his contract, was not entitled to maintain an action to collect the principal secured by the mortgage by a foreclosure thereof before the five years elapsed, it is very clear his representative is not.

The ground taken at the trial was that the contract was void by the statute of frauds, not being in writing, and being an agreement that by its terms was not to be performed within one year from the making thereof. (2 R. S. 135, § 2, sub. 1.) I am of the opinion that it was not affected by the statute. The statute applies to executory, and not to executed contracts; and the one in question, I think, was of the latter description. It was certainly executed by Holcomb; and it seems to me the purchase of the mortgage by the plaintiff's testator was an execution on his part. Holberton agreed in substance to purchase the mortgage, and forbear to foreclose it for five years, in consideration of fifty dollars. He did purchase, and take an assignment of it, and Holcomb paid him the fifty dollars. Thus, the contract was fully executed. Nothing further remained to be done by either party. Holberton had simply to wait five years for his money. Holcomb had paid the consideration money, and Holberton had entered upon the contract by receiving the money and purchasing the mortgage, and neither party could rescind it. Neither could Holcomb recover back the money, nor Holberton refuse to carry out the contract, based as it was upon a good consideration, and which he had undertaken to execute.

The further point is now urged (although not alluded to on the trial), that the mortgage being a specialty, no agreement in regard to it could be valid unless the agreement was also a specialty. It may be conceded that ordinarily a sealed executory contract cannot be rescinded or modified by a parol executory contract; but that was not this case. Here the mortgage was due. The holder was about to enforce it by action; whereupon Holberton agrees, for

a valuable consideration, to purchase and refrain from collecting it for five years. This agreement is executed by the purchase; and as respected the plaintiff's testator, operated as effectually to extend the time of payment as if it had been under seal. Indeed, as title to the mortgage would pass by mere delivery without a written assignment, I cannot see why an agreement to extend the time of payment, if founded upon a good consideration, would not be valid and effectual for that purpose, even if executory, and not reduced to writing. The agreement, in this case, was not one varying the terms of the sealed contract so as to require it to be under seal, but rather an agreement, based upon a good and valid consideration, to hold such contract in abeyance until the expiration of the time fixed upon by the new contract. It was conceded upon the trial that Holcomb was in a proper position to set up the new contract, provided such an one was made.

But, in any event, as suggested by the learned judge delivering the opinion in the Supreme Court, the judgment is sustainable upon the equitable ground that the defendant, having a cause of action, would be allowed to set it up to prevent circuity of action. Holberton having taken the assignment, and held it under the contract as proved, and received a consideration therefor from the defendant, and this action being by his representative, it is the same as if he were seeking to foreclose the mortgage by suit, notwithstanding his agreement. If the defendant could have no defense to the foreclosure, still his agreement with Holberton would give him a right of action for the injury he received; otherwise he would be remediless. In the face of his agreement, Holberton, or his representative, ought not to be allowed to foreclose the mortgage, and on the principle of avoiding circuity of action, the law will give effect to such agreement as a defense to the foreclosure suit.

The judgment of the Supreme Court should be affirmed.¹

All the judges were for affirmance, except SELDEN, J., who thought the agreement void under the statute of frauds, as not to be performed within a year.

Judgment affirmed.

¹ Concurring opinion of JOHNSON, J., is omitted.

OLMSTEAD *v.* LATIMER

COURT OF APPEALS OF NEW YORK, 1899

(158 N. Y. 313)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 9, 1896, modifying and, as modified, affirming a judgment entered upon a decision of the court on trial at Special Term.

In August, 1878, one John G. Latimer executed his bond with a mortgage on a lot and building on Atlantic street, Brooklyn, to secure the sum of \$18,000 borrowed by him. The plaintiff subsequently acquired that bond and mortgage. In 1884 Latimer died intestate, seised of the mortgaged premises, leaving a widow and four brothers (the three defendants and one James D. Latimer), his only heirs at law. Letters of administration were issued on the estate of John G. Latimer, and upon settlement of the estate it appeared that the personal estate was exhausted by the payment of the debts and expenses of administration, leaving a deficiency in the amount due for administrator's fees. The deceased left real estate of considerable value, all of which was, prior to the commencement of this action, sold by the three defendants Latimer, as heirs at law, for the aggregate sum of \$57,500, the value of the widow's dower in which was estimated at \$8,426, leaving the net value of the lands sold in the hands of each of the defendants at the time of the trial at \$12,268.50, outside of the mortgaged premises. The latter were conveyed, during the years 1888 and 1889, to Frederick B. Latimer by bargain and sale deeds, each reciting the consideration of one dollar. After Frederick had acquired all the interest of his brothers in the mortgaged premises, he and the plaintiff executed the following agreement [October 15, 1891]:

"We agree that the time for the payment of the Bond and Mortgage for \$18,000 on 201 and 203 Atlantic Avenue, Brooklyn, made by John G. Latimer to the executors of Noah T. Pike and recorded in the Register's office of Kings County in Liber 1425 of Mortgages, page 17, August 24, 1878, being the date thereof, shall be and hereby is extended to May 1, 1895, subject to the same terms and conditions, including tax, insurance and interest clauses, as at present."

In April, 1892, a fire occurred in the buildings on the mortgaged

premises, by which they were partially injured. In an attempt to restore the buildings they collapsed and became a total loss. By this accident the value of the mortgaged premises fell below the amount of the mortgage. Thereafter, the plaintiff instituted this action to foreclose the mortgage and hold the defendants, as heirs at law of the original bondsman and mortgagor, liable for any deficiency. The trial court held the defendant Frederick liable for $\frac{1}{4}$ of any deficiency, and the other defendants not liable. From this decree the plaintiff and the defendant Frederick appealed to the Appellate Division, the former seeking to hold all the defendants, the latter to be relieved from liability. The court modified the judgment by increasing the liability of the defendant Frederick to one-quarter of any deficiency that may arise on the foreclosure sale, and in all other respects affirmed the judgment.

PARKER, Ch. J. The defendants Latimer, as heirs at law of the mortgagor, were respectively liable under section 1843 of the Code for the debts of the said mortgagor decedent to the extent of their interest in the real property that descended to them from him. The premises covered by the mortgage were primarily liable to pay the mortgage debt. As there was no personal estate the defendants were secondarily liable, and they were properly made parties in the action of foreclosure by virtue of section 1627 of the Code, which provides that "any person who is liable to the plaintiff for the payment of the debt secured by the mortgage may be made a defendant in the action; and if he has appeared, or has been personally served with the summons, the final judgment may award payment by him" of any deficiency. The judgment as it comes to us decrees that the defendant Frederick B. Latimer shall pay one-quarter of the deficiency, but it has been held that the effect of the conveyance of the premises to the defendant Frederick by his brothers in the years 1888 and 1889, together with the fact that he informed the plaintiff of such conveyance, and thereafter made an agreement to extend the time of payment of the bond and mortgage, had the legal effect of making Frederick the principal debtor and his brothers sureties, and hence that the effect of the agreement, extending the time of payment, operated to release the sureties from all liability to the plaintiff on account of the indebtedness evidenced by the bond. Assuming, but not deciding, that the effect of the conveyance, and that which subsequently happened, was to change the obligation of the defendants other than Frederick towards the plaintiff, from that of principals to that of sureties, we come to

the question whether the agreement to extend the time of payment was invalid for want of consideration.

There are several decisions in this court in which the question has been considered, and they are in harmony with one another. In *Kellogg v. Olmsted*, 25 N. Y. 189, the action was on a promissory note by the transferee of the payee. The answer alleged that after the note became due it was mutually agreed between the holder thereof, the payee, and the defendants, "that in consideration that the defendants would keep the principal sum of the said note until the first day of April, 1857, and pay the same with interest on that day, he, the said payee, would extend the time of payment of the principal of said note until the first day of April, 1857; that the said defendants then and there assented to such proposition, and then and there agreed to and with said Covil to keep said principal sum of said note until the first day of April, 1857, and to pay the same with interest on that day." On the trial of the action the referee excluded evidence offered by the defendants to establish the defense so specially set up, and exceptions were taken thereto that presented the question to this court. It was held that an agreement by a creditor to postpone payment of a debt until a future day certain, without other or further consideration than the agreement of the debtor to pay the debt with interest, is void for want of consideration; the court citing, in support of its position, *Miller v. Holbrook*, 1 Wend. 317; *Gibson v. Renne*, 19 Wend. 390; *Pabodie v. King*, 12 John. 426; *Reynolds v. Ward*, 5 Wend. 501; *Fulton v. Matthews*, 15 John. 433.

A dissenting opinion was written by Judge Davies, who two or three years later wrote the principal opinion in *Halliday v. Hart*, 30 N. Y. 474. In that case the action was brought to recover against the maker and two indorsers on a promissory note. The indorsers defended on the ground that the plaintiff had, for a valuable consideration, and in writing, extended the time of payment for a period of some months, and claimed that the effect of such extension was to discharge the sureties from liability. The authorities bearing upon the question were very carefully considered, and the court decided that a partial payment by the maker on account of an overdue note is not a valid consideration for a promise of forbearance as to the residue so as to discharge the indorsers. A concurring opinion was written by Judge Hogeboom, in which he says: "The sureties were not discharged. There was no valid agreement for the extension of the time of payment. There was no payment of any sum which the party paying was not obliged to

pay. The performance of an unqualified legal obligation by payment of part of a sum due upon a note is not a valid consideration for the extension of payment of the remainder.”¹

In *Parmelee v. Thompson*, 45 N. Y. 58, one of the makers of a promissory note after maturity paid to the payee a sum equal to the amount due thereon and took possession of the note. Subsequently he brought suit against another maker, who gave evidence tending to show that while the payee held the note an action was brought thereon in the Supreme Court, and that it was agreed between the defendants and the plaintiff therein that the suit should be discontinued, the defendant to pay the costs and have until the ensuing December to pay the note; that the costs were paid and the suit discontinued, after which the plaintiff became the owner of the note and brought the action before the expiration of the time agreed upon, and the trial judge held that there was no valid agreement to extend the time of payment. The judgment was affirmed in this court, the opinion being written by Judge Allen, in which he said: “It is competent for the parties, by a parol agreement, to enlarge the time of performance of a simple contract. . . . But a promise to extend the time of payment, unless founded on a good consideration, is void. A payment of a part of the debt, or the interest already accrued, or a promise to pay interest for the future, is not a sufficient consideration to support such promise.” (Citing *Miller v. Holbrook*, *Gibson v. Renne* and *Kellogg v. Olmsted*, *supra*.)

Our attention has not been called to any authority in this court in hostility to the position taken in the decisions we have referred to. The reasons assigned by the learned justice who wrote for the Appellate Division, in favor of overthrowing the doctrine of these cases, while presented with marked ability and clearness, are not at all new. They were advanced in the dissenting opinion by Judge Davies in *Kellogg v. Olmsted*, *supra*, the first case in which the question received attention in this court, so far as we are advised. Whether the reasoning of the prevailing or dissenting opinion seems the better, it is not profitable to inquire, for the question was settled by the decision of this court, and has by later adjudications become so firmly grounded that it may not now be questioned.

The judgment should be reversed as to the defendants Henry A. and Brainard G. Latimer, and that of the Special Term modified

¹ The discussion of *Lowman v. Silberstein*, 108 N. Y. 169, has been *Yates*, 37 N. Y. 601, and *Powers v.* omitted.

by striking out the direction to the referee to pay costs to Brainard G. and Henry A. Latimer, and so further modified as to adjudge that the defendants, Frederick B. Latimer, Henry A. Latimer and Brainard G. Latimer, each pay to the plaintiff one-quarter of any deficiency that may arise on the sale of the mortgaged premises under said judgment, and as thus modified affirmed, with costs.

All concur.¹

¹ But see, *contra*, *Benson v. Phipps*, 87 Tex. 578 (1895).

CHAPTER IV
ASSIGNMENT OF MORTGAGE

SECTION I.—MODE OF TRANSFER

LAWRENCE v. KNAP & MENZEY

SUPREME COURT OF ERRORS OF CONNECTICUT, 1791

(1 Root, 248)

PETITION in chancery, shewing that Lownsbury was indebted to Plat, for which he gave his note and a mortgage as collateral security, which deed was recorded. Plat was indebted to Hunter, and for a valuable consideration assigned said note to him [and] at the same time delivered him said mortgage-deed. Hunter assigned said note to the petitioner for a debt which he owed him, and also delivered to him said mortgage.

The petitionees attached the mortgaged lands and had them set off to them on executions, as Plat's estate, in satisfaction of debts due from Plat to them. The petitioner had recovered judgment in ejectment for said lands in Plat's name and had taken possession, and now prays that the petitionees may be compelled to release to him their right and title to said premises, or that he be in some way quieted in his right to said lands.

This cause was twice argued. The court now granted the petition and passed a decree against Menzey (Knap having deceased pending the suit) for him to release all his right to said mortgage premises, upon the principle that the petitioner owned the debt for which said mortgage was given as collateral security—that he who is entitled to the debt, which is the principal thing, hath right to all the collateral securities given to ensure the payment of the debt; especially as in this case, where the actual delivery of the mortgage accompanied the assignment of the note, of which the petitionees had notice.

Afterwards a petition was brought against the heir of Knap and a similar decree passed against them, notwithstanding they had

purchased the equity of redemption of Lownsbury, which might entitle them to redeem, but was no bar to the petition.¹

GREEN v. HART

COURT OF ERRORS OF NEW YORK, 1806

(1 *Johns.* 580)

AYLMAR JOHNSON, on the 2d September, 1796, being justly indebted to William Green in the sum of \$1,551.64, gave him a promissory note for that sum, payable to him, or his order, at the Bank of New York on the 1st of May, 1798. To secure the payment of this note, Jonas Platt, who was a trustee of Johnson, executed a mortgage of two lots of land in Corley's Manor, which was duly registered.

In October, 1796, Green endorsed the note to the respondent, and delivered it to him, with the mortgage, which he holds. The respondent filed his bill against the appellant and others, stating the above facts, and that he paid a valuable consideration for the note and mortgage, and that, by non-payment of the money, he was seised of the mortgaged premises; requiring an answer to every part of the bill, and praying that the money might be paid, or the premises sold in the usual manner.

The respondent, on the 3d of March, 1798, gave a receipt to Green acknowledging that he received the note of Johnson as collateral security for the payment of Green's note to him for \$1,491.11, payable the 3d of May, 1798, and stating that the note of Johnson was secured by a mortgage which was "not assigned."

Johnson, in his answer, insisted that the mortgage had not been assigned to Green, who stated that the sum really lent to him by the respondent was only \$1,035; the residue of the note being for usurious interest. There was no satisfactory evidence of the usury; and the chancellor decreed a sale of the mortgaged premises, and an account to be taken of what was due on Johnson's note, and directed the proceeds to be applied to the payment of what was due and the costs. From this decree Green appealed to this court.

The reasons for the decree were assigned by

THE CHANCELLOR:²

() As to the second point, whether the respondent acquired any right to the mortgage in question by the transfer of the note:

¹ See *Austin v. Burbank*, 2 Day, 474 (1807).

² A portion of the opinion, relating to the question of usury, is omitted.

The note given to the appellant by Aylmar Johnson was coeval, and part of the same transaction, with the mortgage in question, and the only reason why the agency of Jonas Platt was at all connected with it appeared to have been because he held the mortgaged lands, which were intended as collateral security for the payment of the debt due from Johnson, as his trustee. Johnson, therefore, in every equitable point of view, was both the maker of the note and mortgagor, as the mortgage was executed, by his direction or procurement, by his trustee, who has disclaimed all other interest than such as he holds as trustee, and respecting whose interest the parties do not differ.

The endorsement of the note by the appellant to the respondent was accompanied by the delivery of the mortgage. If the note was satisfied, it involved the satisfaction of the mortgage, for the existence of the mortgage, by express reference, depended upon that of the note. In its essence, and by act and operation of law, it was parcel of the same contract, executed at the same time, directed to the same object, and to be satisfied by the same means.

The doctrine laid down by Lord Mansfield in the case of *Martin*, ex dem. *Weston v. Mowlin*, 2 Burr. 969, which was cited in argument before me, applies to this point with much force. The question in that case arose on a bill between the representatives of the real and the representatives of the personal estate of the testator. In defining the species of property of a mortgagor, Lord Mansfield observed: "*A mortgage is a charge upon the land, and whatever will give the money will carry the estate in the land along with it, to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to executors; it will pass by a will not made and executed with the solemnities required by the statute of frauds. The assignment of the debt, or forgiving it, will draw the land after it, as a consequence; nay, it would do it, though the debt were only forgiven by parol; for the right of the land would follow, notwithstanding the statute of frauds.*"¹

The receipt of Ephraim Hart designates the mortgage as delivered, but not assigned. This, it appears to me, was merely descriptive of its situation at the time of its delivery. It had no formal assignment; but if it was intended not to be assigned, its delivery to the respondent is inexplicable, unless the slight ligament connecting the note with the mortgage is the reason, as alleged by the

¹ See Judge Trowbridge's elaborate argument, controverting Lord Mansfield's view, in 8 Mass. 551 (1812), given in part, *supra*, p. 12.

U appellant. But that circumstance would appear to intimate that the parties intended they should remain inseparable.

I think, however, that the transfer of the note, and the delivery of the mortgage, are decisive on this point, and that the respondent took the latter as a legal incident of the transfer of the debt.

SPENCER, J., delivered the unanimous opinion of the court.

On the argument it has been insisted by the appellant's counsel, 2d. That it was not Green's intention to transfer the mortgage to Hart; and had it been so, nothing passed by the mere delivery, as the statute to prevent frauds and perjuries requires a deed or note in writing.¹

a { Courts of equity consider mortgages according to the essential nature of contracts, and give them operation according to the intention of the parties: the debt is, consequently, there esteemed the principal, and the land the incident; and whenever the debt is discharged, the interest of the mortgagee in the land ceases of course. There is, then, a manifest distinction between absolute estates in fee and conditional estates for securing the payment of money. Mortgages are not now considered as conveyances of lands within the statute of frauds; and the forgiving the debt, with the delivery of the security, is holden to be an extinguishment of the mortgage. (Powell, 3d edit., Mort. 54; Barnard, 90; *Richard v. Sims*, 2 Burr. 979.) If, however, a mortgage was within the statute, the circumstances of this case would exempt it from its operation. In case of the payment of the money secured by mortgage, in equity a trust arises for the benefit of the mortgagor; so, where the debt thus secured is transferred by the mortgagee, he becomes a trustee for the benefit of the person having an interest in the debt. (2 Anstruther, 438.) In the case of *Martin v. Mowlin*, 2 Burr. 979, Lord Mansfield lays it down as an established principle, that the assignment of the debt will draw the land after it; and I cannot agree that this was an *obiter dictum* of the judge.

✓ { In the present case the mortgage was delivered to the assignee of the debt. Had it not been delivered, nor anything said about it, I should have considered the respondent, on the failure of Johnson to pay the note, entitled to the aid of the mortgage. It was competent to the parties to agree that the mortgage should not be resorted to by the holder of the note; but the proof of such agreement lies on the appellant, and it should be explicit. The receipt furnishes no evidence of such agreement; it describes the real situation of the

¹ Opinion is given on this second point only.

mortgage as not assigned. But this expression falls far short of an agreement that it was not to be assigned. It does not appear that the appellant had any rights prejudiced by the assignment of the mortgage; and it is impossible to evade the force of the fact of his depositing it in the respondent's hands. It speaks a language incapable of being misunderstood, and is decisive of the question. An issue to investigate the intention of the parties, on that act, would have been useless. I therefore think that the respondent had an equitable interest in the mortgage equivalent to the amount of the principal and interest of his note against Green.))

*Judgment of affirmance.*¹

WARDEN v. ADAMS

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1818

(15 Mass. 233)

THIS was a writ of entry by the said Warden, as assignee of a mortgage made by the said Adams to one John Earle.

The action came on for trial before the Chief Justice at the last April term in this county, and the parties agreed that the following facts should be considered as proved in the case, viz.: The said Adams made and executed the mortgage deed declared on, conditioned for the payment of six promissory notes made by the said John and one Lewis Adams, payable to the said Earle or his order. Afterwards the said Earle became insolvent, and from the 15th of November to the 5th of December, 1815, was in failing circumstances. Previously to the assignment hereafter mentioned Earle had pledged one of the said notes to a person not interested in this suit, but did not assign or deliver over to him the mortgage deed as security, and he afterwards redeemed the note, which he had since transferred to one Sewall Hamilton, but not until after the execution of the assignment to Warden. On the 20th of November, 1815, he deposited with a scrivener two of said notes, and also the mortgage deed, for the purpose of having an assignment thereof made to Warden to secure a debt due from Earle to him.

On the 27th of the same November, Earle endorsed one of the said six notes to said Hamilton, as part security for a debt due him

¹ *Southerin v. Mendum*, 5 N. H. 5 Cal. 515 (1855), accord. See, also, 420 (1831); *Whittemore v. Gibbs*, 24 *Jackson v. Bronson*, 19 Johns. 325 N. H. 484 (1852); *Ord v. M'Kee*, (1822).

from Earle, and at the same time assigned said mortgage deed and the premises therein mentioned to Hamilton, by his deed duly acknowledged and recorded on the same day: the said assignment being made on a separate piece of paper, and referring to the mortgage.

On the 28th of said November, the said Earle executed an assignment of said mortgage deed, on the back thereof, to said Warden, as security for his said debt to him and of some debts due from Earle to certain other persons, which Warden was to assume. This assignment was not acknowledged or recorded. The mortgage deed and the two notes, left with the scrivener for the purpose of having an assignment made, remained in the scrivener's hands until the actual execution of the said assignment to Warden. Hamilton recovered judgment for possession of the mortgaged premises against Adams, and possession was delivered to him by the proper officer: and Adams afterwards entered and continued in possession by a parol lease from the assignee of Hamilton.

The demandant offered to prove, by the testimony of Earle, that when he made the assignment to Hamilton, and prior to that time, Hamilton knew that the original mortgage deed was in the hands of the scrivener, for the purpose of an assignment being made to the demandant, for securing the payment of the two notes transferred to him as aforesaid.

But the Chief Justice, being of opinion that the demandant could not maintain his action, in consequence of the prior assignment to Hamilton, under which the tenant is in possession, and also that Earle was not a competent witness to prove the fact for which he was offered, if such fact were material, directed a nonsuit, which was to be set aside and a new trial granted, if upon the above facts, together with the said knowledge of Hamilton, this action could be maintained.

Burnside and Bangs, for the demandant.—The delivery of the mortgage deed, together with the notes endorsed, for the purpose specified, amounted to such an equitable assignment as the law will protect. It is said by Lord Mansfield in the case of *Martin v. Mowlin*, 2 Burr, 979, that “a mortgage is a charge upon the land: and whatever would give the money will carry the estate along with it, to every purpose. The estate in the land is the same thing as the money due upon it.” “The assignment of the debt, or forgiving it, will draw the land after it, as a consequence; nay, it would do it though the debt were forgiven only by parol; for the right to the land would follow, notwithstanding the statute of

frauds." This doctrine is recognized and confirmed by the Supreme Court of New York in the case of *Green v. Hart*, 1 Johns. 580; see also Powell on Mortgages, 186 to 190; 11 Mass. Rep. 475. Then the second assignment by Earle to Hamilton, with the knowledge of the latter of the prior transaction, was fraudulent and void as to the demandant. And if we should be debarred from fixing this knowledge upon him, we contend that he must be presumed, from the facts found in the case, to have known of the delivery of the deed to the scrivener, and the purpose of such delivery. The absence of the mortgage deed should have put Hamilton on his guard; and he is chargeable with fraudulent motives in taking an assignment under such circumstances. It can make no difference that but two of the six notes were endorsed to the demandant. The mortgage was given as security for these two notes, and might legally and equitably be assigned with them.

Newton for the tenant.—The assignment to Hamilton was prior to that to the demandant, and being in every circumstance conformed to the requisitions of the statute, must have the preference. The assignment of a mortgage is a conveyance of the rents and profits. (11 Mass. Rep. 474, *Goodwin v. Richardson, Adm.*) Then the assignee has such an interest in the land as cannot pass without writing.

The dictum of Lord Mansfield in the case of *Martin v. Mowlin* has been completely put down by Judge Trowbridge in his tract upon mortgages (8 Mass. Rep. 557, and *seq.*); and it may well be presumed that if the judges, who agreed in the decision in the case of *Green v. Hart*, had read that tract, they would not have given the opinion they did. That decision was, however, in chancery, and is no precedent for the government of this court.

By the Court. By force of our statutes regulating the transfer of real estates and for preventing frauds, no interest passes by a mere delivery of a mortgage deed without an assignment in writing and by deed.)

An assignment, made by a separate deed, without the delivery over of the original mortgage deed, conveys all the interest of the mortgagee, and makes the grantee the assignee of the mortgage.)

The knowledge imputed in this case to Hamilton, the assignee, of an intention on the part of Earle, the mortgagee, to assign the mortgage to the demandant, does not impair the tenant's title: he being a *bonâ fide* creditor, and having a right, by his vigilance, to secure his demands in this way: just as he would have had by an attachment, although he might know that another creditor in-)

tended to make an attachment, and had taken incipient measures therefor.

The nonsuit is not set aside.¹

BARRETT v. HINCKLEY

SUPREME COURT OF ILLINOIS, 1888

(124 Ill. 32)

MR. JUSTICE MULKEY delivered the opinion of the Court:

Watson S. Hinckley, claiming to be the owner in fee of the land in controversy, on the 26th day of February, 1885, brought an action of ejection, in the Superior Court of Cook County, against the appellants, George D. Barrett, Adalina S. Barrett, William H. Whitehead, and others, to recover the possession thereof. There was a trial of the cause before the court, without a jury, resulting in a finding and judgment for the plaintiff, and the defendants appealed.

The evidence tends to show the following state of facts: In 1870 Thomas Kearns was in possession of the land, claiming to own it in fee simple. On August 3 of that year he sold and conveyed it to William H. W. Cushman for the sum of \$80,000. Cushman gave his four notes to Kearns for the balance of the purchase money,—one for \$12,500, maturing in thirty days; three for \$16,875 each, maturing, respectively, in two, three and four years after date, and all secured by a mortgage on the premises. The notes seem to have all been paid but the last one. In 1878 Kearns died, and his widow, Alice Kearns, administered on his estate. Previous to his death, however, he had hypothecated the mortgage and last note to secure a loan from Greenebaum. Subsequently, and before the commencement of the present suit, Greenebaum, in his own right, and Mrs. Kearns, as administratrix of her husband, for value, sold and assigned, by a separate instrument in writing, the mortgage and note to the appellee, Watson S. Hinckley.

This is, in substance, the case made by plaintiff. The defendants showed no title in themselves or any one else. The conclusion to be reached, therefore, depends upon whether the case made by

¹ *Smith v. Kelley*, 27 Me. 237 (1847); *Adams v. Parker*, 12 Gray (Mass.) 53 (1858); *Cottrell v. Adams*, 2 Biss. (Ill.) 351 (1870); *Williams v. Teachey*, 85 N. C. 402 (1881), accord.

the plaintiff warranted the court below in rendering the judgment it did.

It is claimed by appellants, in the first place, that much of the evidence relied on by appellee to sustain the judgment below was improperly admitted by the court, and various errors have been assigned upon the record questioning the correctness of the rulings of the court in this respect. They, however, go further, and insist that, even conceding the facts to be as claimed by appellee himself, they are not sufficient in law to sustain the action. As the judgment below will have to be reversed on the ground last suggested, it will not be necessary to consider the other errors assigned.

We propose to state, as briefly as may be, some of the reasons which have led us to the conclusion reached. In doing so, it is perhaps proper to call attention at the outset to some considerations that should be steadily kept in mind as we proceed, and to which we attach not a little importance.

It is first to be specially noted, that this is a suit at law, as contradistinguished from a suit in equity. It is brought to enforce a naked legal right, as distinguished from an equitable right. The plaintiff seeks to recover certain lands, the title whereof he claims in fee simple. To do this, he is bound to show in himself a fee simple title at law, as contradistinguished from an equitable fee. (Fischer v. Eslaman, 68 Ill. 78; Wales v. Bogue, 31 id. 464; Fleming v. Carter, 70 id. 286; Dawson v. Hayden, 67 id. 52.) Has he done this? He attempts to derive title remotely through the mortgage from Cushman to Kearns, but upon what legal theory is not very readily perceived. His immediate source of title, however, seems to be Mrs. Kearns, as administratrix of her husband, and Greenebaum, as pledgee of the note and mortgage. The instrument through which he claims is lost or destroyed, and all we know concerning its character is what the plaintiff himself says about it. As to its contents, he does not pretend to state a single sentence or word in it, but characterizes it as an assignment, and gives the conclusions which he draws from it in general terms only. After stating his purchase of the note and mortgage in January, 1880, he says: "The assignment was from Mrs. Kearns, the administratrix of Thomas Kearns' estate, and Elias Greenebaum, the banker. At the time of the purchase a separate writing was given to me,—a full assignment. . . . It was a very explicit assignment, or full assignment of the note and mortgage and the land, the property, and all the right and title to the land." It will be observed, the instrument is throughout characterized as an as-

assignment only, which does not, like the term "deed," or "specialty," signify an instrument under seal. A mere written assignment, founded upon a valuable consideration, is just as available for the purpose of passing to the assignee the equitable title to land as an instrument under seal. Such being the case, we would clearly not be warranted in inferring that the assignment was under seal from the simple fact that the witness gives it as his opinion that the instrument was "a full assignment" of the land, which is nothing more than the witness' opinion upon a question of law. There not being sufficient evidence in the record to show that the assignment was under seal, it follows that even conceding the legal title to the property to have been in Mrs. Kearns and Greenebaum, or either of them, it could not have passed to the appellee by that instrument, and if not by it, not at all, because that is the only muniment of title relied on for that purpose. This conclusion is, of course, based upon the fundamental principle that an instrument *inter partes*, in order to pass the legal title to real property, must be under seal.

But this is not all. Even conceding the sufficiency of the assignment to pass the legal title, the record, in our opinion, fails to show that the assignors, or either of them, had such title; hence, there was nothing for the assignment to operate upon, so far as the legal estate in the land is concerned. Having no such title, they could not convey it. *Nemo plus juris ad alium transferre potest quam ipse habet.* That the legal estate in this property was not either in Greenebaum or Mrs. Kearns at the time of the assignment to plaintiff, is demonstrable by the plainest principles of law. Let us see. Thomas Kearns was the owner of this property in fee. He conveyed it in fee to Cushman. The latter, as a part of the same transaction, reconveyed it, by way of mortgage, to Kearns. By reason of this last conveyance, Kearns became mortgagee of the property, and Cushman mortgagor. According to the English doctrine, and that of some of the States of the Union, including our own, Kearns, at least as between the parties, took the legal estate, and Cushman the equitable. According to other authorities, Kearns, by virtue of Cushman's mortgage to him, took merely a lien upon the property to secure the mortgage indebtedness, and the legal title remained in Cushman. For the purposes of the present inquiry it is not important to consider just now, if at all, which is the better or true theory. It is manifest, and must be conceded, that the legal estate in the land, after the execution of the mortgage, was either in the mortgagee or mort-

gagor, or in both combined. Such being the case, it is equally clear, appellee, to succeed, must have deduced title through one or both of these parties. This could only have been done by showing that the legal title had, by means of some of the legally recognized modes of conveying real property, passed from one or both of them to himself. This he did not do or attempt to do. Indeed, he does not claim through them, nor either of them. Not only so, neither Mrs. Kearns nor Greenebaum, through whom appellee does claim, derives title through any deed or conveyance executed by either the mortgagor or mortgagee. Nor does either of them claim as heir or devisee of the mortgagor or mortgagee.

As the assignment of the note and mortgage to appellee did not, as we hold, transfer or otherwise affect the legal title to the land, it may be asked, what effect, then, did it have? This question, like most others pertaining to the law of mortgages, admits of two answers, depending upon whether the rules and principles which prevail in courts of equity, or of law, are to be applied. If the latter, we would say none; because, as to the note, that could not be assigned by a separate instrument, as was done in this case, so as to pass the legal title. (*Ryan v. May*, 14 Ill. 49; *Fortier v. Darst*, 31 id. 213; *Chickering v. Raymond*, 15 id. 362.) As to the mortgage, it is well settled that could not be assigned, like negotiable paper, so as to pass the legal title in the instrument or clothe the assignee with the immunity of an innocent holder, except under certain circumstances, which do not apply here. (*Chicago, Danville and Vincennes Railway Co. v. Loewenthal*, 93 Ill. 433; *Hamilton County v. Lubukee*, 51 id. 415; *Olds v. Cummings*, 31 id. 188; *McIntyre v. Yates*, 104 id. 491; *Fortier v. Darst*, 31 id. 213.) But that the mortgagee, or any one succeeding to his title, might, by deed in the form of an assignment, pass to the assignee the legal as well as the equitable interest of the mortgagee, we have no doubt, though there is some conflict on this subject. (2 Washburn on Real Prop., p. 115, and authorities there cited.) Yet the assignors in the case in hand, not having the legal title, as we have just seen, could not, by any form of instrument, transmit it to another. If, however, the rules and principles which obtain in courts of equity are to be applied, we would say that by virtue of the assignment the appellee became the equitable owner of the note and mortgage, and that it gave him such an interest or equity respecting the land as entitled him to have it sold in satisfaction of the debt.

There is, perhaps, no species of ownership known to the law

which is more complex, or which has given rise to more diversity of opinion, and even conflict in decisions, than that which has sprung from the mortgage of real property. By the common law, if the mortgagor paid the money at the time specified in the mortgage, the estate of the mortgagee, by reason of the performance of the condition therein, at once determined and was forever gone, and the mortgagor, by mere operation of law, was remitted to his former estate. On the other hand, if the mortgagor failed to pay on the day named, the title of the mortgagee became absolute, and the mortgagor ceased to have any interest whatever in the mortgaged premises. By the execution of the mortgage, the entire legal estate passed to the mortgagee, and unless it was expressly provided that the mortgagor should retain possession till default in payment, the mortgagee might maintain ejectment as well before as after default. This is the view taken by the common law courts of England, and which has obtained, with certain limitations, in most of the States of the Union, including our own, in which the common law system prevails.

In *Carroll v. Ballance*, 26 Ill. 9, which was ejectment by the mortgagee against the assignee of the mortgagor to recover the mortgaged premises, this court thus states the English rule on the subject: "In England, and in many of the American States, it is understood that the ordinary mortgage deed conveys the fee in the land to the mortgagee, and under it he may oust the mortgagor immediately on the execution and delivery of the mortgage, without waiting for the period fixed for the performance of the condition,—citing *Coote on Mortgages*, 339; *Blaney v. Bearce*, 2 Greenlf. 132; *Brown v. Cramer*, 1 N. H. 169; *Hobart v. Sanborn*, 13 *id.* 226; *Northampton Paper Mills v. Ames*, 8 Metc. 1. And this right is fully recognized by courts of equity, although liable to be defeated at any moment in those courts by the payment of the debt." Again, in *Nelson v. Pinegar*, 30 Ill. 481, which was a bill by a mortgagee to restrain waste, it is said: "The complainant, as mortgagee of the land, was the owner in fee, as against the mortgagor and all claiming under him. He had the *jus in re* as well as *ad rem*, and being so, is entitled to all the rights and remedies which the law gives to such an owner." So, in *Oldham v. Pfleger*, 84 Ill. 102, which was ejectment by the heirs of the mortgagor against the grantee of the mortgagor, this court, in holding the action could not be maintained, said: "Under the rulings of this court, the mortgagee is held, as in England, in law, the owner of the fee, having the *jus in re* as well as the *jus ad rem*." In *Finlon v.*

Clark, 118 Ill. 32, the same doctrine is announced, and the cases above cited are referred to with approval. (*Taylor v. Adams*, 115 Ill. 574.)

Courts of equity, however, from a very early period, took a widely different view of the matter. They looked upon the forfeiture of the estate at law because of non-payment on the very day fixed by the mortgage as in the nature of a penalty, and, as in other cases of penalties, gave relief accordingly. This was done by allowing the mortgagor to redeem the land, on equitable terms, at any time before the right to do so was barred by foreclosure. The right to thus redeem after the estate had become absolute at law in the mortgagee was called the "equity of redemption," and has continued to be so called to the present time. These courts, looking at the substance of the transaction rather than its form, and with a view of giving effect to the real intentions of the parties, held that the mortgage was a mere security for the payment of the debt; that the mortgagor was the real beneficial owner of the land, subject to the incumbrance of the mortgage; that the interest of the mortgagee was simply a lien and incumbrance upon the land, rather than an estate in it. In short, the positions of mortgagor and mortgagee were substantially reversed in the view taken by courts of equity. These two systems grew up side by side, and were maintained for centuries without conflict, or even friction, between the law and equity tribunals by which they were respectively administered. The equity courts did not attempt to control the law courts, or even question the legal doctrines which they announced. On the contrary, their force and validity were often recognized in the relief granted. Thus, equity courts, in allowing a redemption after a forfeiture of the legal estate, uniformly required the mortgagee to reconvey to the mortgagor, which was, of course, necessary, to make his title available in a court of law.

In maintaining these two systems and theories in England, there was none of that confusion and conflict which we encounter in the decisions of the courts of this country, resulting chiefly from a failure to keep in mind the distinction between courts of law and of equity, and the rules and principles applicable to them, respectively. The courts there, by observing these things, kept the two systems intact, and in this condition they were transplanted to this country, and became a part of our own system of laws. But other causes have contributed to destroy that certainty and uniformity which formerly prevailed with us. Chiefly among these

causes may be mentioned the statutory changes in the law in many of the States, and the failure of the courts and authors to note those changes in their expositions of the law of such States. Perhaps another fruitful source of confusion on this subject is the fact that in many of the States the common law forms of action have been abolished by statute, and instead of them a single statutory form of action has been adopted, in which legal and equitable rights are administered at the same time and by the same tribunal. Yet the distinction between legal and equitable rights is still preserved, so that although the action, in theory, is one at law, it is nevertheless subject to be defeated by a purely equitable defence.

Under the influence of these statutory enactments and radical changes in legal procedure, by which legal and equitable rights are given effect and enforced in the same suit, the equitable theory of a mortgage has, in many of these States, entirely superseded the legal one. Thus, in New York it is said, in the case of *Trustees of Union College v. Wheeler et al.*, 61 N. Y. 88, that "a mortgage is a mere chose in action. It gives no legal estate in the land, but is simply a lien thereon, the mortgagor remaining both the legal and equitable owner of the fee." Following this doctrine to its logical results, it is held by the courts of that State that ejectment under the code will not lie, at the suit of the mortgagee, against the owner of the equity of redemption. (*Murray v. Walker*, 31 N. Y. 399.) In strict conformity with the theory that the mortgagee has no estate in the land, but a mere lien as security for his debt, the courts of New York, and others taking the same view, hold that a conveyance by the mortgagee, before foreclosure, without an assignment of the debt is, in law, a nullity. (*Jackson v. Curtis*, 19 Johns. 325; *Wilson v. Troup*, 2 Cow. 231; *Jackson v. Willard*, 4 Johns. 41.)¹ And this court seems to have recognized the same rule as obtaining in this State, in *Delano v. Bennett*, 90 Ill. 533.

The New York cases just cited, and all others taking the same view, are clearly inconsistent with the whole current of our decisions on the subject, as is abundantly shown by the authorities already cited. The doctrine would seem to be fundamental, that

¹ In the *Jackson* case, 19 Johns. (N. Y.) 325 (1822), the court said: "It is now well settled, that the mortgagee has a mere chattel interest; and the mortgagor is considered as the proprietor of the freehold. The

mortgage is deemed a mere incident to the bond or personal security for the debt; and the assignment of the interest of the mortgagee in the land, without an assignment of the debt, is considered in law as a nullity."

if one *sui juris*, having the legal title to land, intentionally delivers to another a deed therefor containing apt words of conveyance, the title, at law, at least, will pass to the grantee; but for what purposes or uses the grantee will hold it, or to what extent he will be able to enforce it, will depend upon circumstances. If the mortgagee conveys the land without assigning the debt to the grantee, the latter would hold the legal title as trustee for the holder of the mortgage debt. (*Sanger v. Bancroft*, 12 Gray, 367; *Barnard v. Eaton*, 2 Cush. 304; *Jackson v. Willard*, 4 Johns. 41.) It is true, the interest which passes is of no appreciable value to the grantee. Thus, in the case last cited, Chancellor Kent, in speaking of it, says: "The mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no determinate value. If it should be assigned, the assignee must hold the interest at the will and disposal of the creditor who holds the bond." In 4 Wait's Actions and Defences, page 565, the rule is thus stated: "By the common law, a mortgagee in fee of land is considered as absolutely entitled to the estate, which he may devise or transmit by descent to his heirs." In conformity with this view, Pomeroy, in his work on *Equity Jurisprudence* (vol. 3, page 150), in treating of this subject, says: "In law, the mortgagee may convey the land itself by deed, or devise it by will, and on his death, intestate, it will descend to his heirs. In equity, his interest is a mere thing in action, assignable as such, and a deed by him would operate merely as an assignment of the mortgage; and in administering the estate of a deceased mortgagee, a court of equity treats the mortgage as personal assets, to be dealt with by the executor or administrator."

We have already seen, that under the decisions of this court, and by the general current of authority, a mortgage is not assignable at law by mere indorsement, as in the case of commercial paper; but, on the other hand, the estate and interest of the mortgagee may be conveyed to the holder of the indebtedness, or even to a third party, by deed, with apt words of conveyance, and the fact that it is, in form, an assignment, will make no difference. (2 Washburn on Real Prop. 115, 116.) Such an assignee, if owner of the mortgage indebtedness, might, no doubt, maintain ejectment in his own name, for his own use; or the action might be brought in his name, for the use of a third party owning the indebtedness. (*Kilgour v. Gockley*, 83 Ill. 109.) So in this case, if the action had been brought in the name of Kearns' heirs, for the use of Hinckley, no reason is perceived why the action might not be maintained.

It must not be concluded, from what we have said, that the dual

system respecting mortgages, as above explained, exists in this State precisely as it did in England prior to its adoption in this country, for such is not the case. It is a conceded fact, that the equitable theory of a mortgage has, in process of time, made in this State, as in others, material encroachments upon the legal theory, which is now fully recognized in courts of law. Thus, it is now the settled law that the mortgagor or his assignee is the legal owner of the mortgaged estate, as against all persons except the mortgagee or his assigns. (*Hall v. Lance*, 25 Ill. 250, 277; *Emory v. Keighan*, 88 *id.* 482.) As a result of this doctrine, it follows that in ejectment by the mortgagor, against a third party, the defendant cannot defeat the action by showing an outstanding title in the mortgagee. (*Hall v. Lance*, *supra.*) So, too, courts of law now regard the title of a mortgagee in fee, in the nature of a base or determinable fee. The term of its existence is measured by that of the mortgage debt. When the latter is paid off, or becomes barred by the Statute of Limitations, the mortgagee's title is extinguished by operation of law. (*Pollock v. Maison*, 41 Ill. 516; *Harris v. Mills*, 28 *id.* 44; *Gibson v. Rees*, 50 *id.* 383.) Hence the rule is as well established at law as it is in equity, that the debt is the principal thing, and the mortgage an incident. So, also, while it is indispensable in all cases to a recovery in ejectment, that the plaintiff show in himself the legal title to the property, as set forth in the declaration, except where the defendant is estopped from denying it, yet it does not follow that because one has such title, he may, under all circumstances, maintain the action,—and this is particularly so in respect to a mortgage title. Such title exists for the benefit of the holder of the mortgage indebtedness, and it can only be enforced by an action in furtherance of his interests,—that is, as a means of coercing payment. If the mortgagee, therefore, should, for a valuable consideration, assign the mortgage indebtedness to a third party, and the latter, after default in payment, should take possession of the mortgaged premises, ejectment would not lie against him at the suit of the mortgagee, although the legal title would be in the latter, for the reason it would not be in the interest of the owner of the indebtedness. In short, it is a well settled principle, that one having a mere naked legal title to land in which he has no beneficial interest, and in respect to which he has no duty to perform, cannot maintain ejectment against the equitable owner, or any one having an equitable interest therein with a present right of possession. This case, with a slight change of the circumstances, would afford an excellent illustration of the prin-

ciple. Suppose the present plaintiff had obtained possession under his equitable title to the note and mortgage, and the heirs of Kearns, who hold the legal title, had brought ejectment against him, the action clearly could not have been maintained, for the reasons we have just stated. But it does not follow, because such an action would not lie against him, that he could, upon a mere equitable title, maintain the action against others. (*Cottrell v. Adams*, 2 Biss. 351; 9 Myers' Fed. Dec. 240.) The question in that case was almost identical with the question in this, and the court reached the same conclusion we have. See, also, *Speer v. Haddock*, 31 Ill. 439.

For the reasons stated, the judgment of the court below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.¹

Judgment reversed.

¹ See, *Torrey v. Devitt*, 53 Vt. 331 (1881); *Jordan v. Cheney*, 74 Me. 359 (1883).

CHAPTER IV (*continued*)

SECTION II.—EFFECT OF TRANSFER

MATTHEWS *v.* WALLWYN

HIGH COURT OF CHANCERY, 1798

(4 *Ves.* 118)

1 THE cause was heard upon bill and answer. / When it was first opened, the Lord Chancellor directed it to stand over, that it might be formally argued; considering the point to be new, and of great importance, as it might affect the general credit of mortgages.

✓ LORD CHANCELLOR [LOUGHBOROUGH]: In this cause the question was only whether the assignee of a mortgage had a right to be paid according to the sum that appeared due upon the mortgage deed, whatever might be the state of the account between the mortgagor and mortgagee. The circumstances had nothing in them so particular as to vary at all the general question. Matthews had created a mortgage, upon which Shephard had advanced money; and, Shephard being his attorney, the purpose of creating the mortgage was that money might be raised for the use of Matthews. Shephard ought not to have made any use of the mortgage but for the purpose for which it was created, viz., to raise money for Matthews; but he thought fit to assign the mortgage without the privity of the mortgagor, and the assignee now claims to hold the mortgage to the full extent of the sum appearing due upon the face of the deed.

3 When the cause came on before me, a case was referred to in which, it was supposed, Lord Thurlow had entertained an idea, but not decided, that a mortgagor having permitted the mortgage deed without any indorsement upon it to be in the possession of the mortgagee, an assignee taking from that mortgagee might have a right to hold that mortgage to the full extent of it against the mortgagor who permitted the mortgagee to deal with and to make a security upon it. It was also supposed that in practice there is no occasion to make the mortgagor a party; and in some cases it may not be possible to make him a party to the assignment;

and that to hold that the assignee of a mortgage is bound to settle the accounts of the person from whom he takes the assignment, would tend to embarrass transfers of mortgages. I have got all the information I could, and I think I have got the best. The result is that persons most conversant in conveyancing hold it extremely unfit and very rash, and a very indifferent security, to take an assignment of a mortgage without the privity of the mortgagor as to the sum really due; that in fact it does happen that assignments of mortgages are taken without calling upon the mortgagor; but that the most usual case where that occurs is where it is the best security that can be got for a debt not otherwise well secured, and it is not in the course of transferring mortgages, but of raising money upon such securities; but no conveyancer of established practice would recommend it as a good title to take an assignment of a mortgage without making the mortgagor a party and being satisfied that the money was really due.

With regard to the case that was quoted, I believe that from the circumstances of the first order that was made, there might have been some doubt expressed at the time upon the point. The bill was filed by Lunn and others, assignees of Lodge, a bankrupt, against St. John. According to the state of the case I have had, Lodge made a mortgage to Pitman, who, being indebted to St. John, made an assignment to him for a sum less in fact than the sum due upon the mortgage. It was stamped and signed, but not sealed. Lodge and Pitman both became bankrupts. The bill was filed, insisting that nothing was due upon the account between their estates. The defendant St. John insisted that the plaintiffs must redeem him, who was a fair mortgagee, and had nothing to do with the account. Lord Thurlow in the decree gave special directions to the Master to inquire what was due at the time of the mortgage, what was due at the time of the assignment, and what remained due—saving the point, how far St. John would be affected, till after the report upon that special direction. It came on upon the report before the Lords Commissioners, the Master having reported that Pitman was indebted to Lodge in 7000*l*. By the order made upon that report it was declared that the assignments, dated the 13th of February, 1755, and May, 1776, made by Pitman to the defendants St. John and Muilman are to be deemed null and void against the estate of Lodge, the bankrupt, and are to be delivered up by the defendants St. John and Muilman to the plaintiff, the surviving assignee of Lodge, to be cancelled; that all deeds and writings relating to the estate of Lodge be delivered up upon

oath; and that the defendants join in reconveying the estate. The final result therefore was that, nothing being due upon the original mortgage, the two assignees of it took no benefit by the assignments. Therefore that case is a direct authority in favor of Matthews.

4 { The cases decided, and long decided, in *Precedents in Chancery* and *Vernon*, seem also to bear very much upon it; where it was made a question, now perfectly settled, that, as between the mortgagee and the persons claiming under him, without the privity of the mortgagor they cannot add to what is due, settle the account, or turn interest into principal. The mortgagee having been in possession, the assignee is bound to settle the account of the rents and profits received by the mortgagee, from whom he takes the assignment. Considering the general principles upon which this Court acts with regard to mortgages, I have no difficulty in deciding the point. It is true there is a legal estate or term; but it must be apparent upon the face of the title that it is not an absolute conveyance of the term or legal estate, but as a security for a debt; and the real transaction is an assignment of a debt from A. to B.—that debt collaterally secured by a charge upon a real estate. The debt therefore is the principal thing; and it is obvious that if an action was brought upon the bond in the name of the mortgagee, as it must be, the mortgagor shall pay no more than what is really due upon the bond; if an action of covenant was brought by the covenantee, the account must be settled in that action. In this court the condition of the assignee cannot be better than it would be at law in any mode he could take to recover what was due upon the assignment.

Therefore the plaintiff must be at liberty to redeem upon payment of what the Master shall find due upon the original mortgage from him to Shephard. I will direct the account exactly in the same way as Lord Thurlow made the direction in the case I have cited: an account of what was due at the time of the mortgage, what was due at the time of the assignment, and what remains due.¹

¹ "It is settled that, if an assignment of a mortgage is taken without the intervention of the mortgagor, whatever the assignee pays he can claim nothing under the assignment but what is actually due between the mortgagor and mortgagee; and I think that rightly settled. I would not say so, but that I know Lord Kenyon entertained a doubt of Lord

Rosslyn's decision upon that subject."—*Per* Lord Eldon in *Chambers v. Goldwin*, 9 Ves. 254, 264 (1804). The reference is to the decision of Lord Loughborough (subsequently created Lord Rosslyn) in the principal case.

And see, *Turner v. Smith*, [1901] 1 Ch. Div. 213.

PARKER v. CLARKE

CHANCERY—THE ROLLS COURT, 1861

(30 *Beav.* 54)

WILLIAM GRAY CRUCHLEY was, under the will of his father, entitled to a share of his real and personal estate.

By an indenture dated the 5th of July, 1849, William George Cruchley conveyed and assigned to Mr. Thomas all his estate and interest under the will for securing 95*l.* This mortgage was executed while William George Cruchley was in prison for debt, and the Court, after weighing the evidence, came to the conclusion that it was given without consideration and under a promise to release the mortgagor from prison, which was never performed.

On the 12th July, 1849, Thomas transferred this mortgage to the defendant Clarke, who had notice of the circumstances under which it had been obtained, and in July, 1860, Clarke deposited the mortgage and transfer with Phillips to secure the payment of moneys due and to become due. Phillips had no notice of the circumstances under which the mortgage had been obtained.

This bill was filed against Clarke and Phillips for a declaration that the mortgage deed was void, and for an order for its delivery up to be cancelled.

Mr. Follett and Mr. Ellis, for the plaintiff, contended that the deed was void, and that Phillips, having a mere equitable title to what might be due on the mortgage, could only claim such interest as Clarke was entitled to.

Mr. Bagshawe and Mr. J. Napier Higgins, for Clarke, contended that the evidence failed in shewing that no consideration had been given for the mortgage.

Mr. Lloyd and Mr. Locock Webb, for Phillips, argued that he was a purchaser for valuable consideration without notice, and that he was entitled to hold the deed until he had been paid what was due to him; that the mortgagor, having enabled Clarke to obtain money on the faith of this deed, could not set it aside without paying what had been actually advanced on it by Phillips.

THE MASTER OF THE ROLLS [SIR JOHN ROMILLY]:

I am of opinion in this case, that the deed must be delivered up. The first question to be considered is whether the deed is not void, being a mortgage deed for which no consideration was given, and

Y having been obtained from a person in prison, under promises to release him, which were never realized.

This, I am of opinion, is the state of the case:—[His Honor here examined the evidence and proceeded:]—The result is that in my opinion it is proved that no consideration was given for the mortgage deed and, as against Clarke, it must be delivered up to be cancelled.

With respect to Phillips, I am of opinion he could only take what Clarke could give him, and that he cannot stand in a better situation than Clarke himself. Phillips must therefore deliver up the deeds, and his only remedy will be against Clarke.

WEBB v. COMMISSIONERS OF HERNE BAY

COURT OF QUEEN'S BENCH, 1870

(*L. R. 5 Q. B. 642*)¹

AN action commenced by writ, with an indorsement that the plaintiffs intended to claim a writ of mandamus to command the defendants to apply all the money raised or to be raised under or by virtue of 3 and 4 Wm. IV., c. 55, in the manner prescribed by s. 123 of that act. At the trial a verdict was taken for the plaintiffs, subject to a case.

The defendants are a body corporate, incorporated by the said act for the purpose of local improvement, and empowered by the act to levy rates and to borrow money at interest, mortgaging the rates and issuing debentures for that purpose. The form of the debentures was prescribed by the act, which also made them capable of assignment in the form provided. Further, the commissioners were declared incapable of taking or entering into any bargain or contract under the act, and a penalty was prescribed for so doing. In 1835 the defendants bought large quantities of bricks of David Halket, one of the commissioners, who was a brick and tile manufacturer, and in payment therefor issued to him certain mortgage securities of £100 each, in the form prescribed by the act, and which were duly registered. The mortgages were in the form of grants of the rates levied by the commissioners to David Halket, his executors, administrators and assigns. No money was actually paid by Halket to the commissioners. The mortgages so granted to him were duly transferred to the testator of the plain-

¹ A short statement of facts is substituted for that given in the report.

tiffs, who had no notice of the circumstances under which they were issued. No part of the principal or interest of the mortgage debt has ever been paid. Section 123 of the act above referred to authorizes the commissioners to apply the money to be raised by them in discharging such interest and principal.

The questions for the opinion of the Court were:—

1st. Whether the plaintiffs are entitled to recover in this action any and, if so, what sum as damages in respect of arrears of interest on the six mortgages or any of them.

2nd. Whether the plaintiffs are entitled to a writ of mandamus in the form endorsed on the writ.

COCKBURN, C. J. By 3 & 4 Wm. 4 c. cv. a local Act, which provided for the paving, cleansing, lighting, and improving the town of Herne Bay, certain commissioners are appointed: and by s. 119 the commissioners have power to mortgage the rates which they are empowered to levy under the Act for the purposes which they as such commissioners are to execute; and the present plaintiffs sue upon certain debentures which were issued by the commissioners under that section; and they also claim a writ of mandamus requiring the commissioners to apply the money raised or to be raised under the Act to the purposes of the Act. In order to construct certain buildings necessary for the purposes of the Act, the commissioners required a quantity of bricks, and Halket, to whom the debentures were originally given, supplied the bricks in question, and instead of being paid in cash he was paid by debentures. It is said that the transaction in respect of which the debentures were issued was illegal under s. 10 of the local Act, inasmuch as by that section any person acting as a commissioner is prohibited from entering into any contract with the commissioners; and that, therefore, the sale of the bricks by Halket to the commissioners, he himself being a commissioner, was an illegal transaction. It may be that the effect of this section was to render the transaction illegal as regards the contract between the commissioners and Halket. But as the commissioners have had the benefit of the contract, the question would be whether or not Halket could recover in indebitatus assumpsit for goods sold. I do not think it necessary to decide that question. I proceed entirely upon the ground that the defendants are estopped from disputing the validity of the debentures in question. It is true the commissioners have power under s. 119 only to borrow money, and it may be that under the power to borrow they were not authorized to

give debentures for the purpose of paying for goods and materials supplied to them for the purposes of the town. But the commissioners gave to Halket, in respect of the bricks which they got from him, debentures, in the form prescribed by the Act, which purport upon the face of them to be debentures given for money advanced to them. Halket, to whom the debentures were originally given, has parted with them for a valuable consideration to the testator of the present plaintiffs, who are in the position of assignees of the original holder, and we must take it as a fact that the assignees were perfectly ignorant of any illegality in the original transaction either as regards Halket being a commissioner, and therefore prohibited from entering into such a contract with the commissioners, or as to the fact of their being debentures given for goods supplied instead of for money advanced. Under those circumstances, it is clear the principle laid down in *Pickard v. Sears*, 6 A. & E. 469, and *Freeman v. Cooke*, 2 Ex. 654, is immediately applicable to the present case, as well also as the doctrine laid down in the judgment of this Court in the case to which my Brother Blackburn referred,¹ *Re Bahia and San Francisco Ry. Co.*, L. R. 3 Q. B. 584. In that case a railway company had been deceived into registering shares and granting certificates of registration, whereby innocent persons were induced to purchase those shares under the belief that the vendors were registered shareholders, and it was held that the company were estopped by their own act from denying the right of the innocent transferees of the shares to be registered as shareholders. I think the principle of all those cases is strictly applicable to this. How is a person who takes for a valuable consideration such debentures as these upon an assignment, regular in form, to know under what circumstances they were issued? The commissioners might be wrong in allowing these debentures to go forth, knowing that they might come into the hands of an innocent holder for value, but according to the principle of the cases cited, they are estopped from alleging that the debentures were illegally issued. The debentures on their face import a legal consideration, namely, the advance of money. The defendants issued the debentures with the knowledge that they were capable of being transferred, and would very likely be transferred to a holder for value; how can it lie in their mouths to say that the transaction in respect of which they gave these debentures was illegal? I think on the sound principle of the doctrine laid down in the cases which I have cited, such a defence cannot be made available.

¹ Upon the argument, the report of which is omitted here.

I confess I cannot see any difficulty in the other points made, namely, that the first purpose to which moneys raised by the commissioners is to be applied is that of paying the costs and charges of getting the Act. It is true these expenses have been met partly by debentures which are still unpaid; but that is no answer to an application for payment on the part of the present holder of these debentures.

It was further contended that the mandamus claimed by the plaintiffs will not lie, because it is possible that rates may not hereafter be raised, and the form of the mandamus ought to have been to levy rates out of which to pay the interest on the debentures; but it appears that up to the present time rates have from time to time been levied, and if the rates be levied, inasmuch as the commissioners are bound under the Act to pay interest upon the debentures which they have issued, the mandamus will operate and compel payment of the amounts claimed in this action. If, owing to the form which this mandamus assumes, the commissioners desist from levying the rates, the consequence will be that a further mandamus will be required, commanding the commissioners to levy a rate for the express purpose of paying the interest; but I think we are fairly entitled to presume that that which has been done, and which is a part of the duty of the commissioners to do under the provisions of the Act, will continue to be done.¹

Judgment for the plaintiffs.

BICKERTON v. WALKER

SUPREME COURT OF JUDICATURE—CHANCERY DIVISION, 1885

(L. R. 31 Ch. D. 151)

ELIZABETH GOULSTON, who died in 1862, bequeathed to trustees a sum of £1000 upon trust to invest it and pay the income to Elizabeth Bickerton, the wife of John Bickerton, for life, and after her death upon trust for such children of hers as should be living at her decease, and being sons should attain twenty-one, or being daughters should attain that age or marry, and for such issue of any children dying in Mrs. Bickerton's lifetime as should be living at Mrs. Bickerton's death, such children to take their parent's share. The legacy was invested in £975 New £3 per Cent. Annuities.

¹ Concurring opinions of BLACKBURN, MELLOR and LUSH, JJ., omitted.

In 1879 Mrs. Bickerton was a widow with three children, all of whom had attained twenty-one. Emily Bickerton, spinster (hereinafter called Miss Bickerton), was one of them.

On the 10th of February, 1879, Mrs. and Miss Bickerton executed a mortgage deed by which, in consideration of the sum of £250 therein expressed to be paid to them by Ebenezer Bates, "the receipt and payment of which said sum of £250 they, the said E. Bickerton and E. Bickerton the younger, do hereby acknowledge, and from the same and every part thereof do hereby release the said E. Bates, his executors, administrators, and assigns," they jointly and severally covenanted with Bates for the payment to him of £250 with interest at £7 per cent. on the 10th of August then next. Mrs. Bickerton then assigned to Bates her life interest in the £975 stock and a policy of assurance for £100 effected by her on her own life, and Miss Bickerton assigned to Bates her reversionary share in the £975 stock and a policy of assurance for £300 effected by her on her own life, subject, as regards all the interests assigned, to redemption on payment of £250 with interest at £7 per cent. on the 10th of August then next. Indorsed on the deed was a receipt in the usual form, signed by Mrs. and Miss Bickerton, acknowledging the receipt of £250.

Astley acted as solicitor for both parties in this transaction, and the deed was left in his hands. On the 11th of March, 1879, the mortgage was transferred by Bates to Hunter, who acted by his own solicitor, Walker, and gave full value for the mortgage as a mortgage for £250, without making any inquiry from the mortgagors.

This action was commenced by Mrs. and Miss Bickerton against Walker, Bates, Astley, and Hunter, alleging that the plaintiffs had only received sums amounting to £91 17s. 6d. instead of £250, that Bates was the nominee and trustee of and for Walker, and that Bates and Astley acted under his directions, and that Hunter had notice of the above facts when he took his transfer. The plaintiffs asked that the mortgage might be cancelled, they offering to pay the sum really advanced and the interest thereon, and that the transfer might be declared void against the plaintiffs, or in the alternative that the mortgage might stand as a security for what had been really advanced and interest, and that the plaintiffs might have redemption on that footing, or as another alternative, that they might have redemption on the mortgage deed as it stood.

It was clearly shewn that Walker was not interested in the mortgage, and had simply acted as Hunter's solicitor, and no

ground was shewn for affecting either of them with notice that the plaintiffs had not received the whole £250. Vice-Chancellor Bacon considered the plaintiff's case not to be proved, and gave a judgment dismissing the action with costs as against Walker, and dismissing it with costs as against Hunter, except so far as it sought the ordinary judgment for redemption. The usual order in a redemption suit was made against Hunter, with a direction that the account was to be taken on the footing of £250 having been advanced to the plaintiffs.

The plaintiffs appealed, and the appeal was heard on the 16th and 17th of November, 1885. The evidence as to the circumstances under which the mortgage was executed was gone into, and in the opinion of the Court of Appeal was such as would, if there had been no transfer, have made it proper to decree redemption on payment only of what should be shewn to have been actually advanced. Astley was abroad and Bates did not appear, so the material question was whether a decree of that nature could be made against Hunter.

Seward Brice, for the appellants:—I contend that a mortgage can only be enforced by a transferee to the same extent as it might be enforced by the original mortgagee. (*Parker v. Clarke*, 30 Beav. 54.) The transferee takes subject to the equities which affect the original mortgagee. (*Norrish v. Marshall*, 5 Madd. 475.)

[FRY, L. J.:—That case only deals with subsequent transactions between the mortgagor and mortgagee, the mortgagor not knowing of the transfer.]

The principle is illustrated by *Matthews v. Wallwyn*, 4 Ves. 118, which decides that a transferee takes subject to the account between the mortgagor and mortgagee. The principal thing in the transaction is the assignment of the debt, as said by Lord Eldon in that case. The debt, until the recent change in the law, was only assignable in equity; the assignment is subject therefore to equitable principles, and passes nothing but what is justly due on the instrument. *Williams v. Sorrell*, 4 Ves. 389, follows the same principle. The true view is that the transferee is bound by all equities affecting the mortgage transaction, not merely by the state of the account. *Smith v. Parkes*, 16 Beav. 115, shews that the assignee of a debt takes subject to all equities.

[BOWEN, L. J.:—Are you not estopped by the deed and the receipt upon it from saying that the whole sum was not advanced? (*Goodwin v. Roberts*, 1 App. Cas. 476.)]

That was the case of a document which by custom is a negotiable

instrument. The present is the case of a mortgage which is not given with a view of its passing from hand to hand.

[BOWEN, L. J., referred to *In re Agra and Masterman's Bank*, L. R. 2 Ch. 391.]

The present case is more like *In re Natal Investment Company*, L. R. 3 Ch. 355, in which the *Agra Bank Case* was referred to, and which is a strong authority in my favour. There is no estoppel from a recital in a security unless it is shewn that the recital is intended to be shewn to third parties to induce them to act upon it; and the fact that no prudent person takes a transfer of a mortgage without an inquiry from the mortgagor, shews that the recital is not intended to be acted on. (*Roll v. White*, 31 Beav. 520, and *Athenæum Life Assurance Society v. Pooley*, 3 De G. & J. 294, support my contention. I say then that the mortgage ought to be cut down as against Hunter. No prudent transferee of a mortgage ever takes his transfer without inquiring from the mortgagor, and it is negligence to do so. The case is quite different from that of an absolute sale, because there an inquiry would not be made of the original vendor unless there was something to raise suspicion.

Miller, Q. C., and Laing, for Walker and Hunter:—As against Walker there is no case: he ought never to have been made a party, and the dismissal as against him must stand. As regards Hunter, assuming that the whole £250 was not advanced, we say that he is not affected by that. If a person takes a transfer of a mortgage without inquiring from the mortgagor, he does so at his own risk as regards the state of the account, but the mortgagor is estopped from saying that any statement made by himself is untrue. The transferee has a right to act on any such statement. Everybody knows that the sum due on a mortgage may have been reduced by part payment, and if a transferee makes no inquiry from the mortgagor the mortgagor gets the benefit of previous part payments as against him. By saying that a less sum than the original principal is now due he is not contradicting anything in the mortgage deed, but here the mortgagor is alleging as against a *bonâ fide* purchaser without notice that the statement in the mortgage deed as to the sum advanced is not true. That cannot be allowed. *Hunter v. Walters*, L. R. 7 Ch. 75; *West v. Jones*, 1 Sim (N. S.) 205; *Rice v. Rice*, 2 Drew. 73. In *Shropshire Union Railways and Canal Company v. The Queen*, L. R. 7 H. L. 496, 509, Lord Cairns refers to *Rice v. Rice*, with approbation. The principle is not confined to cases where A. makes a written representation to B. with the intention that it shall be shewn to

C., for both Lord Cairns in the last-mentioned case, and Lord Hatherley in *Hunter v. Walters*, lay it down broadly that a receipt for money estops the party giving it, as between him and a third person who has acted on the faith of it.

[FRY, L. J.:—An assignment of a chose in action is subject to all equities. Do you say that the receipt is an assertion that there are no such equities?]

I say that at all events it makes the equities unequal; a person who has given a receipt stating that he has received money, and then disputes its truth, cannot have as good an equity as a person who acted on the faith of the receipt.

[BOWEN, L. J.:—What do you say to *In re Natal Investment Company*, L. R. 3 Ch. 355?]

In that case there was no receipt, and no one buying a debenture in the market buys it on the faith of the whole of the money having been advanced, it being notorious that debentures are often issued below par. In none of the cases cited against us was there any indorsed receipt. *White v. Wakefield*, 7 Sim. 401, is strong in our favour.

The judgment of the Court (Sir James Hannen, and Bowen and Fry, L. JJ.), was delivered by

FRY, L. J.:¹ As the legal interest in the legacy was and is vested in the trustee of Mrs. Goulston's will, it is evident that the interests both of the plaintiffs and of the defendant Hunter are equitable interests only, and the real question for our decision is, what are the relative merits of these persons having adverse equitable interests? If the merits of the one are greater than those of the other, the Court will give the priority to the greater merits; if and only if the merits are equal, it will give the priority of right to the one who is prior in point of time.

The plaintiffs executed a deed which recited that they had received the whole sum of £250, and which stipulated that their right of redemption should be on payment of the sum of £250 and interest, they signed a receipt on the back of the deed stating that they had in fact received this sum of £250, and they permitted Bates, or Astley, who was acting with or for him, to have possession of the deed containing these false statements. That the plaintiffs were in a moral point of view excusable for these acts is beyond doubt, and that they were deceived by those whom they trusted, and as such are objects of sympathy, is equally clear.

¹ Portion of opinion omitted.

But they were inexact and careless, and placed in the hands of Bates or Astley the means of deceiving other persons, and these are in the view of a Court of Equity demerits.

Was Hunter guilty of negligence or want of care in his part of the transaction? He must, on the evidence before us, be taken to have advanced his money on the faith of the production of the mortgage deed and receipt signed by the plaintiffs; and if the assignment by the plaintiffs had been, not a mortgage but an absolute conveyance, it would, we think, have been clear that there would have been no negligence whatever on the part of the defendant Hunter in not inquiring of the plaintiffs as to their rights or claims. But it has been argued before us that there is a wide difference in this respect between a mortgage and an absolute conveyance, because it is said, and said truly, that in the ordinary course of business a prudent assignee of a mortgage, before paying his money, requires either the concurrence of the mortgagor in the assignment, or some information from him as to the state of accounts between mortgagor and mortgagee. The reason of this course of conduct is however, in our opinion, to be found in the fact that an assignee of a mortgage is affected by all transactions which may have taken place between mortgagor and mortgagee subsequently to the mortgage, and the assignee is bound to give credit for all moneys received by his assignor before he has given notice of the assignment to the mortgagor. But in the present case the assignment was made very soon after the execution of the mortgage, and before the time for payment had arrived; so that, whilst it was possible, it was not probable, that any payment would have been made either of principal or interest; and we are of opinion that if an assign is willing to take the risk of any payment having been made after the date of the mortgage he is not guilty of carelessness or negligence if, in the absence of any circumstances to arouse suspicion, he relies upon the solemn assurance under the hand and seal of the mortgagor as to the real bargain carried into effect by the mortgage deed, upon the possession of that deed by the mortgagee, and upon the receipt for the full amount of the mortgage money under the hand of the mortgagor.

The presence of a receipt indorsed upon a deed for the full amount of the consideration money has always been considered a highly important circumstance. The importance attached to this circumstance seems at first sight a little remarkable when it is remembered that the deed almost always contains a receipt, and often a release, under the hand and seal of the parties entitled to

the money. But there are circumstances which seem to justify the view which has prevailed as to its importance. A deed may be delivered as an escrow, but there is no reason for giving a receipt till the money is actually received, unless it be to enable the person taking the receipt to produce faith by it. A deed is not always, perhaps rarely, understood by the parties to it, but a receipt is an instrument level with the ordinary intelligence of men and women who transact business in this country, and which he who runs may read and understand.

Our decision follows, as will be obvious to those who are familiar with this branch of law, the general lines laid down by Kindersley, V. C., in *Rice v. Rice*, 2 Drew. 73. For the solution of the particular question which distinguishes this case from that, viz., whether there is for this purpose any difference between a mortgage and an absolute conveyance, we have not been aided by any authority cited to us at the bar.

For the reasons already given we dismiss this appeal with costs.

OLDS v. CUMMINGS

SUPREME COURT OF ILLINOIS, 1863

(31 Ill. 188)

WRIT OF ERROR to the Circuit Court of Bureau county; the Hon. M. E. Hollister, Judge, presiding.

This was a bill in chancery exhibited in the Circuit Court by Justin H. Olds against Preston Cummings, Cynthia Cummings, his wife, and others, asking the foreclosure of a mortgage.

It appears that on the 21st of November, 1857, Preston Cummings executed to the order of Charles L. Kelsey his two certain promissory notes, both payable some months thereafter. On the same day on which the notes were executed, Preston Cummings, with his wife, Cynthia Cummings, to secure the payment of these notes, executed and delivered to Kelsey a mortgage upon real estate. The notes were assigned to Olds, the complainant, by Kelsey, the payee, as the bill alleges, before their maturity. Olds, the assignee, sought by this bill to foreclose the mortgage mentioned. Cummings, in his answer, admits the execution of the notes and mortgage described in the bill, but interposes the defense of usury. It is also alleged in the answer, that the assignment of the notes by Kelsey to Olds was made (if at all) long after their maturity;

but that, in fact, the matter of the assignment was only colorable, not made *bona fide* for a valuable consideration, and only to prevent the defendants setting up the defense before mentioned.

The record contains voluminous proofs upon these contested questions of fact; but it is not important to consider the evidence, as the point determined arises out of the facts as insisted upon by the complainant himself.

The Circuit Court held that the equity of the case was with the defendant, Preston Cummings, and that there was usury in the notes sued upon, of which usury the complainant had notice, and that he was not entitled to recover the same, but only the principal and interest in the notes, after deducting the usury which they contained: and a decree was rendered accordingly. Olds, the complainant below, then sued out this writ of error, and questions the correctness of that decree, because, among other grounds, the Circuit Court sustained the defense of usury as against him.

MR. CHIEF JUSTICE CATON delivered the opinion of the court: We do not find it necessary to determine the question whether Olds was a *bona fide* purchaser of this mortgage or not. In a case submitted subsequent to this one we have been called upon to examine the question as to how far the rights of the assignee of a mortgage, purchased for a valuable consideration before due, and in ignorance of any equities or defense, shall be affected by such defense; and, as this record also presents the question, and as the conclusion at which we have arrived decides the case, we shall here consider this question and none other.

By the common law choses in action were not assignable. For the convenience of commerce, by the statute of Anne, in England, certain choses in action were made assignable, so as to vest in the assignee the legal title, as promissory notes and bills of exchange. We have a statute, also, making certain choses in action assignable, prescribing a particular mode in which they shall be assigned. Our statute provides that any promissory note, bond, bill, or other instrument in writing, whereby one person promises to pay to another any sum of money or article of personal property, or sum of money in personal property, shall be assignable by indorsement thereon. Now, the mortgage, to foreclose which this bill was filed, was given to secure the payment of two promissory notes which were assigned by the payee and mortgagee to the complainants. This was, in equity, an assignment of the mortgage. The notes were assignable by the statute, but the mortgage is not, nor is it

assignable by the common law. The assignee of a mortgage has no remedy upon it by law, except it be treated as an absolute conveyance, and the mortgagee convey the premises to the assignee by deed; and upon the question whether this can be done, the authorities are conflicting. Even our statute, authorizing foreclosures of mortgages by *scire facias*, has carefully confined the right to the mortgagee, and does not authorize this to be done by assignees. But it is said that the assignment of the notes carries with it the mortgage, which is but an incident to the principal debt. That is true in equity, and only in equity. Courts of equity will not be confined to legal forms and legal titles, but look beyond these to the substantial, equitable rights of parties, and allow parties who have equitable rights to enforce those rights in their own names, without regard to legal titles. The assignee of a judgment, even, may, in his own name, enforce it in equity. But while courts of equity thus enforce equitable rights, they do it with a scrupulous regard to the equitable rights of others. Thus, if the assignee of a judgment attempt to enforce it in equity, no matter how much he paid for it, or how ignorant he might have been that it had been paid, or that there was other reason why it should not be collected, the court of equity will look into all the circumstances, and will not enforce it in his favor, if it ought not to be enforced in the hands of the assignor. He who buys that which is not assignable at law, relying upon a court of chancery to protect and enforce his rights, takes it subject to all infirmities to which it is liable in the hands of the assignor; and the reason is, that equity will not lend itself to deprive a party of a right which the law has secured him, if such right is intrinsically just of itself.

We have not met with a single case where remedy has been sought in a court of chancery, upon a mortgage, by an assignee, in which every defense has not been allowed which the mortgagor or his representatives could have made against the mortgagee himself, unless there has been an express statute authorizing the assignment of the mortgage itself. There are many cases in which the assignees have been protected against latent equities of third persons, whose rights, or even names, do not appear on the face of the mortgage. And the reason is, that it is the duty of the purchaser of a mortgage to inquire of the mortgagor if there be any reason why it should not be paid; but he should not be required to inquire of the whole world, to see if some one has not a latent equity which might be interfered with by his purchase of the mortgage, as, for instance, a *cestui que trust*.

We shall refer to a few of the many cases to be met with on this subject. In *Murray v. Lyburn*, 2 J. C. R. 441, the question arose upon a bill to foreclose a mortgage by the assignee, and Chancellor Kent said: "It is a general and well-settled principle, that the assignee of a chose in action takes it subject to the same equities it was subject to in the hands of the assignor. But this rule is generally understood to mean the equity residing in the original obligor, and not an equity residing in some third person, against the assignor." And for this distinction he assigns the reason above stated. Again, he says, in the same case: "But bonds and mortgages are not the subjects of ordinary commerce." Here is expressed the very essence of the reason of the law. Mortgages are not commercial paper. It is not convenient to pass them from hand to hand, performing the real office of money in commercial transactions, as notes, bills and the like. When one takes an obligation secured by a mortgage, relying upon the mortgage as the security, he must do it deliberately, and take time to inquire if any reason exists why it should not be enforced; while he may take the mere promise to pay the money, as commercial paper, and depend upon the personal security of the parties to it. It may be said to be a distinguishing characteristic of commercial paper, that it relies upon personal security, and is based upon personal credit. It is a part of the credit system, which is said to be the life of commerce, which requires commercial instruments to pass rapidly from hand to hand. Mortgage securities are too cumbersome to answer these ends. The note itself, though secured by a mortgage, is still commercial paper; and when the remedy is sought upon that, all the rights incident to commercial paper will be enforced in the courts of law. But when the remedy is sought through the medium of the mortgage; when that is the foundation of the suit, and the note is merely used as an incident, to ascertain the amount due on the mortgage, then the courts of equity, to which resort is had, must pause, and look deeper into the transaction, and see if there be any equitable reason why it should not be enforced. He who holds a note, and also a mortgage, holds in fact two instruments for the security of the debt; first, the note with its personal security, which is commercial paper, and, as such, may be enforced in the courts of law, with all the rights incident to such paper; and the other, the mortgage, with security on land, which may be enforced in the courts of equity, and is subject to the equities existing between the parties. The right of an assignee to set at defiance a defense which could be made against the assignor is an arbitrary

statutory right, created for the convenience of commerce alone, and must rely upon the statute for its support, and is not fostered and encouraged by courts of equity.

In *Westfall v. Jones*, 23 Barb. 10, the Court said: "Does the plaintiff, being a *bona fide* purchaser and assignee of the bond and mortgage, stand in any better condition than the person from whom he derived his title? It is a well-settled principle that the assignee of a chose in action takes it subject to all the equities which existed against it in the hands of the assignor." In this case the defense to the foreclosure was that the mortgage was given without consideration, and to defraud creditors, and the Court refused to enforce it, but left the assignee, as it would have left the mortgagee, where their contract left them. The case thus decides that the term *equities*, as here used, means *defenses*. The opinion of the Court proceeds: "But I am prepared to hold that the plaintiff has no other or greater rights in relation to this bond and mortgage, and stands in no better position, than Parsons, the mortgagee."

So, in Pennsylvania the same rule was held. In *Mott v. Clark*, 9 State R. 399, the Court said: "He (the assignee) takes it (the mortgage) subject to all the equities of the mortgagor, but not to the latent equities of a third person;" holding the same rule precisely as the case first referred to, as decided by Chancellor Kent; and such also was the case of *Prior v. Wood*, 31 Pa. State R., where the Court protected the assignee of the mortgagee against the latent equities of third persons against the assignor. And this is as far as any Court has gone in the protection of a *bona fide* assignee of a mortgage, when the proceeding was on the mortgage itself, and in the absence of any express statutory provision authorizing the assignment of the mortgage.

We find the law to be, both upon principle and authority, that the assignee of the mortgage in this case took it subject to the defense which the mortgagor had against it in the hands of the assignor. Of the sufficiency of that defense, to the extent admitted by the Circuit Court, no question was made.

The decree must be affirmed.

BAILY v. SMITH

SUPREME COURT OF OHIO, 1863

(14 Oh. St. 396)

RANNEY, J. On the 8th day of October, 1853, the plaintiff gave to the defendant, Charles H. Bolles, his negotiable promissory note for the sum of \$5370, and payable two years after date, with interest. Prior to the 14th of December, in the same year, sundry payments had been made and indorsed thereon, leaving then due the sum of \$2500; and on that day the plaintiff executed and delivered a mortgage upon real estate situated in Lorain county to secure this balance. On the 9th of June, 1856, he filed his amended petition against Bolles, the original payee of the note, Kendall and Lucas, through whose hands the note and mortgage had passed by assignment, and Smith, the then holder, to compel the delivery and cancellation of these instruments; alleging that the note was given for a pretended patent right for a machine which was utterly worthless, whether patented or not; that both the note and mortgage were obtained by fraud, and that every subsequent holder thereof took them with full notice of the fraud and want of consideration.

Smith alone answered the petition, and claimed to have purchased the note and mortgage from Lucas shortly before they fell due, without notice of any fraud or want of consideration, and to be a bona fide holder thereof for value, and entitled to be protected as such.

The plaintiff obtained the relief demanded in his petition for everything beyond the amount paid by Smith for the note and mortgage, with interest thereon, and for that amount an affirmative judgment for the sale of the mortgaged premises was rendered in favor of Smith, and the plaintiff was ordered to pay the costs of the action.

This judgment was founded upon a finding by the court that the note was obtained by fraud, and without consideration, of which the intermediate parties, Kendall and Lucas, had notice, and that, as against them and Bolles, the plaintiff was entitled to the relief prayed for in his petition; but the court further find that Smith purchased the note and mortgage from Lucas in September, 1855, and paid therefor \$1250, without knowledge of the fraud and want of consideration existing between the original parties,

and is entitled to hold the mortgage for the sum so paid with interest, and to recover thereon for that amount. Passing by, without any remark, the objection that this affirmative judgment in favor of Smith could not have been rendered without a distinct counterclaim interposed by him, and coming at once to the merits of the controversy, it is evident that the judgment can only be supported upon the establishment of the two propositions: first, that upon the facts found by the court, taken in connection with his answer asserting his title, the defendant, Smith, in the sense of the commercial rule, was a *bona fide* holder of the note, without notice of the equities existing between the original parties; and, second, that the immunity belonging to the note in the hands of such a holder, in virtue of this rule, is extended to the mortgage by which it was originally secured, and equally entitles the holder to recover upon that.

A sum of money due upon the note, from Baily to Smith, is an indispensable predicate upon which to found a judgment upon the mortgage; and as no personal judgment was rendered or attempted, and as both note and mortgage, until they came to the hands of Smith, are found to have been fraudulent and void, it is equally evident that he can sustain his judgment only upon the assumption that the attributes of negotiability belonged to the mortgage as well as the note, and if this can not be done, that the finding upon the note falls with the judgment rendered upon the mortgage. Without such finding, there can be no such judgment; and with the finding, there still can be no judgment, if Smith only succeeded to the rights of his assignor in the mortgage.

[The learned judge here considers at length the objections urged by plaintiff's counsel, in opposition to the finding of the court below that Smith was a *bona fide* holder of the note and mortgage for value, and comes to the conclusion that there was no error in the finding.]

The remaining question is one of much importance, and for the first time presented in this court. As it was supposed to be involved in other cases upon our docket, we have given opportunity to counsel in those cases to be heard, and after full argument, we have bestowed upon it very careful attention. Does the fact that a note, obtained by fraud, has passed into the hands of a *bona fide* indorsee, entitle him to enforce a mortgage given to the original holder to secure its payment? Or may the mortgagor still insist upon the fraud, as a defense to an action brought to foreclose it? On the one hand, the question is in no way affected by the further

question whether a mortgagee acquires such an interest in the land as to enable his grantee, being also assignee of the note, by deed duly executed, to claim the benefit of the rule which protects *bona fide* purchasers of real estate—there being no claim that any such deed was made? And on the other, we assume, as undoubted, that, whether a written assignment was made or not, the assignee of the note acquired all the rights and interests of the assignor in the mortgage. Very little aid is to be derived, either from adjudged cases or the elementary books, in the solution of the precise question now before us. This is not because the purchase and assignment of mortgages is a new thing. On the contrary, scarcely any business transaction has been more common and familiar, or has oftener engaged the attention of the courts. Nor has the nature of this instrument, and the rights of parties growing out of its assignment, either alone or in connection with a non-negotiable security, escaped attention, or failed to receive very full and accurate illustration. In such case, the universally acknowledged doctrine from the case of *Davies v. Austen*, 1 Ves. 247, to *Bush v. Lathrop*, 22 New York R. 535, has been, that it is to be regarded as a chose in action, and, as expressed by Lord Thurlow, “the purchaser must abide by the case of the person from whom he buys;” but during all that long period, neither in England nor in any of the old states of the Union, does the question seem to have been presented, whether it might not have a different effect upon its assignment when made to secure a negotiable instrument. This may be accounted for, in part, undoubtedly by the general practice of taking a non-negotiable bond with a mortgage; but it cannot be doubted that mortgages have many times been taken to secure negotiable bills and notes, fraudulently transferred, and if such a distinction was thought to exist, it seems very singular that the holders should never have made the attempt to avail themselves of such securities. In New York the attempt has been frequently made to confine the principle that the purchaser must abide by the case of the seller, to the original debtor, allowing him to make the same defense against the assignee that he could against the assignor, but protecting the assignee without notice from what have been denominated latent equities, or interests in third persons, not in the apparent chain of title. And this for the very plausible reason that one proposing to purchase such an instrument might inquire of the debtor whether he pretended to any defense, and make his answer estop him from afterward asserting any, but that no amount of diligence would enable him to protect himself from

such latent equities. But, after some vacillation in judicial opinion, the Court of Appeals, in *Bush v. Lathrop*, repudiated the distinction, and held that the purchaser in such cases must rely upon the good faith of the seller, that he could "take only such title as the seller had and no other," and that if mortgages were "to be further assimilated to commercial paper, the legislature must so provide."

But the direct question arising upon mortgages given to secure negotiable paper has arisen in two of the new states of the west, whose courts are entitled to high respect for their learning and ability, and it has there been held that the quality of negotiability is so far imparted to such mortgages as to make them available in the hands of a *bona fide* indorser of the paper, without any regard to the equitable rights of the original parties. (*Reeves v. Scully*, Walker's Ch. Rep. 248; *Dutton v. Ives*, 5 Michigan Rep. 515; *Fisher v. Otis*, 3 Chand. Rep. 83; *Martineau v. McCollum*, 4 id. 153; *Croft v. Bunster*, 9 Wisconsin Rep. 503.) In the first of these cases, decided by the Chancellor of Michigan in 1843, no reasons are assigned or authorities cited; and in *Dutton v. Ives*, decided by the Supreme Court in 1858, the doctrine is again advanced upon the authority of *Reeves v. Scully*, and the two Wisconsin cases, reported in 3 and 4 Chandler. On referring to the first case decided in that state (*Fisher v. Otis*), we find it professedly based on authority, and it serves to show upon what a slender foundation a line of decisions may be made to rest. The court say: "This doctrine is sustained by respectable authorities, and by the reason and sound policy which have long ruled in relation to commercial paper;" and Powell on Mortgages, 908, and note are cited. Mr. Powell certainly did suggest the question whether such a distinction might not be made. His exact position is thus stated by Mr. Coventry in the note: "When it is said that a debt is not assignable at law, it must be understood with this restriction, that if it be secured by a negotiable instrument, such as a bill of exchange, the legal interest will pass by indorsement, and this has induced the learned author, in the next paragraph of the text, to suggest whether, in such a case, the rule as to the mortgagee's liability would apply." The rule here referred to is that announced by Lord Loughborough in the leading case of *Matthews v. Wallwyn*, 4 Ves. 126, that the assignee of a mortgage takes it subject to all equities which could be asserted against his assignor. Now, it may be fairly assumed that Mr. Powell supposed that such a distinction could be judiciously made; but it must be admitted that he had

then no authority to base it upon, that neither the judicial records of England, nor in any of the old States, furnish any evidence that it has ever been adopted, and that it was first acted upon, nearly half a century after the suggestion was made, by a new State upon another continent. Under such circumstances, it can not be reasonably claimed that we are at liberty to regard it as an established principle, and we can only adopt it when we are convinced that it is correct in principle, and consistent with the analogies of the law. The reasons for supposing it to be so are well stated in the case of *Croft v. Bunster*, 9 Wis. Rep. 510. The reason assigned, it is said, why the assignee can recover no more in equity than is actually due from the mortgagor to the mortgagee, is, that he could recover no more at law on the bond or covenant, and the reason ceasing as to negotiable securities, the rule also ceases to have application; that the debt is the principal thing, and the mortgage the mere incident, following the debt wherever it goes, and deriving its character from the instrument which evidences the debt. To which may be added the consideration pressed upon our attention in argument, that, if a recovery may be had for the debt, the mortgagor can have no interest in withdrawing the mortgaged property from liability to satisfy it. This last position is easily disposed of. If it were true, it would furnish no authority for changing the legal character and incidents of the mortgage deed, and it is evident that other lien-holders would often have a deep interest in the question. But it is not true as to the mortgagor. The right to dispose of property at the will of the owner, and to pay honest debts instead of those tainted with fraud, are valuable privileges, of which he should not be deprived without a necessity exists; and a decree upon the mortgage would very often deprive him of the benefits of the homestead law, which could not be effected by a judgment upon the fraudulent note. It is very evident also that the wife of the mortgagor, in a large majority of cases, might have a deep interest in the solution of this question. Wholly incapable of becoming a party to any commercial contract whatever, she may nevertheless convey her estate, or release her dower, by way of mortgage for the security of her husband's negotiable paper. If the mortgage is to be deemed negotiable in the hands of an assignee of the paper, we see no escape from the conclusion that the mortgage must be enforced against her, however gross and palpable the fraud may be by which it was obtained.

In a general sense, it may be very well and very correct to speak of a mortgage as an incident to the debt it is created to secure; but

the importance of this mere term may be easily overrated. It certainly is not one of the incidental effects of the creation of the debt itself, and it can only be made to have relation to the debt by the force of the contract contained in the mortgage; and is incident to the debt only in the same sense that every independent contract, having for its object the payment or better security of the debt, is incidental to it. The existence of the debt is the occasion out of which they arise, and the subject of their various provisions; but they embrace all the elements of a perfect contract in themselves, and are enforced by appropriate remedies, according to their own stipulations. At law, a mortgage effects the conveyance of an estate upon condition; but in the view of a court of equity, where alone the rights of an assignee can be enforced, it is a chose in action, having no negotiable quality, and not differing in character from collateral personal agreements, designed to effect the same object. Any of these collateral agreements may be entered into for the purpose of securing a debt, evidenced by a negotiable instrument; and if they are not obtained by fraud, and rest upon a sufficient consideration, in the absence of any agreement to the contrary, they undoubtedly enure in equity to the benefit of any owner of the debt. But the question here is, whether one of these collateral agreements, made to secure a negotiable note, loses its character of a mere chose in action, and has imparted to it the qualities of negotiability, so that upon the transfer of the note it may be enforced, although obtained by fraud? This question has been repeatedly answered, in respect to a class of collateral agreements, much more intimately connected with the negotiable instrument than is the mortgage deed. We refer to guarantees indorsed upon the note itself. Passing by those which have been claimed to be such, but held by the courts to be mere indorsements, or original contracts, with apt words of negotiability incorporated in them, the universal doctrine has been that the legal title does not pass upon the transfer of the note; that they are mere non-negotiable choses in action, and to be treated in every respect as such. (*Lamorieux v. Hewit*, 5 Wend. 307; *McLaren v. Watson's Executors*, 26 Wend. 425; *Miller v. Gaston*, 2 Hill, 188.) In the first of these cases Chief Justice Savage says: "Promissory notes are negotiable only by virtue of the statute, but this negotiable quality is not extended to any other instrument relating to the note;" and Bronson, J., in the last, in support of the same position, says: "But the guarantee itself is not a negotiable instrument, and can not be transferred to a third person so as to give him a legal title

to proceed in his own name against the guarantor. As in the case of other contracts which are not in their own nature assignable, the remedy upon a guarantee is confined to the original parties to the instrument." We have said that these instruments are much more intimately connected with the note than is a mortgage deed. This will be apparent when it is remembered that the one ordinarily guarantees the particular instrument specified in it, and does not survive a renewal or other change of the evidence of indebtedness; while the other secures the debt, whatever changes may intervene, until it is paid; and, even a positive statutory bar which precludes a recovery upon the note, it has been held, does not prevent the enforcement of the mortgage. (*Fisher v. Mossman*, 11 Ohio St. Rep. 42.)

In order to sustain the judgment rendered in this case, it is indispensably necessary to affirm—either that the mortgage, when made to secure a negotiable note, contrary to its general nature and qualities, becomes a negotiable instrument or that the transfer of such a note, without the aid of any statute, or of any judicial decision, except those of very recent date, has an effect beyond the note itself, and draws after it, and within, one of the most important incidents of negotiability, a collateral contract having relation to the same debt. A very careful consideration of the whole subject has convinced us that we have no power to do either, and that neither justice nor public policy would be promoted by making the attempt. It certainly has never been thought to be within the province of a court to determine what instruments should be taken from the list of mere choses in action, and clothed with the attributes of negotiability. Bills, foreign and inland, assumed this position upon the immemorial custom of merchants, and were adopted into the law upon the reasons which avail to make up the great body of the common law. But the statute, third and fourth Anne, was found necessary to place promissory notes upon the same footing; and from that day to this, neither in England nor in this country has an instrument been added without express legislative sanction. Indeed, this could not well be otherwise. The necessities of commerce, and the instruments best calculated to answer its purposes, must all be considered before any intelligent decision could be made. These are legislative functions, requiring experience and extensive information, and calling for the exercise of a discretion wholly incompatible with the fixed certainty of judicial decision. But if it were otherwise, and the discretion rested with us, we could not introduce the mortgage

deed into the list of negotiable instruments without disregarding the very foundation principles upon which such paper has always been supposed to rest. From the case of *Miller v. Race*, 1 Burr. R. 452, to the very latest case in our own reports, the language of the courts has been uniform, that such paper is only allowed in the interests of commerce, and "possessing some of the attributes of money," to answer the purposes of currency. Lord Mansfield, in answer to the "ingenious" argument of Sir Richard Lloyd that the plaintiff could take nothing by assignment from a thief who had stolen paper, said the fallacy of the argument consisted in comparing bank notes to what they did not resemble. "They are not goods," he said, "not securities, nor documents for debt nor are so esteemed; but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind;" "the course of trade creates a property in the assignee or bearer," and they can not be recovered "after they have been paid away in currency, in the usual course of business." This was said, it is true, of bank notes; but the same principles, and for the same reasons, were afterward applied by the same learned judge to every description of negotiable paper, and the case of *Miller v. Race* is still the leading authority upon this branch of commercial law.

Now, mortgages are not necessities of commerce; they have none of the "attributes of money," they do not pass in currency in the ordinary course of business, nor do any of the prompt and decisive rules of the law merchant apply to them. They are "securities," or "documents for debts," used for the purposes of investment, and unavoidably requiring from those who would take them with prudence and safety, an inquiry into the value, condition and title of the property upon which they rest; nor have we the least apprehension that commerce will be impeded by requiring the further inquiry of the mortgagor, whether he pretends to any defense, before a court will foreclose his right to defend against those which have been obtained by force or fraud.

Against any amount of mere theory advanced to sustain the position that commerce requires these instruments to be invested with negotiable qualities, may be successfully opposed the stubborn fact, that in the first commercial country of the world, as well as in the great commercial states of the American Union, they have never been used for such purposes, or heard of in such a connection. It is quite immaterial whether this has arisen from the cause supposed—that they are never made to secure negotiable paper—or not; since it equally shows that no necessity for their use has ever been

felt. A long experience has demonstrated that they are not necessary instruments of active trade and business; and we but follow in the footsteps of the ablest and wisest judges when we say that the harsh rule which excludes equities, and often does injustice for the benefit of commerce, should not be applied to them. This remits them to the position they have so long occupied—that of mere choses in action; and whether standing alone or taken to secure negotiable or non-negotiable paper, they are only available for what was honestly due from the mortgagor to the mortgagee. If they are assigned, either expressly or by legal implication, the assignee takes only the interest which his assignor had in the instrument—acquires but an equity, and, upon the long-established doctrine in courts of equity, is bound to submit to the assertion of the prior equitable rights of third persons. To hold otherwise is to engraft legal incidents upon a mere equitable title; to give to the transfer of negotiable paper an effect beyond what it imports, or is necessary in the accomplishment of its legitimate purposes; and, finally, to invest with negotiable qualities a class of instruments, neither used for nor adapted to the trade and commerce of the country, and thereby to deprive the mortgagor of the just right of defending against fraud, without subserving any public policy whatever.

These views necessarily lead to the conclusion that, upon the facts found in the court below, the plaintiff was entitled to have his title cleared from the incumbrance of this fraudulent mortgage, and that the court erred in giving the affirmative judgment of foreclosure in favor of Smith. For this error that judgment is reversed, and the cause remanded for further proceedings.

PECK, C. J., and BRINCKERHOFF, SCOTT and WILDER, JJ., concurred.¹

¹ *Johnson v. Carpenter*, 7 Minn. 176 (1862); *Bouligny v. Fortier*, 17 La. Ann. 121 (1865), accord. And see *Jones v. Dulick*, 8 Kans. App. 855, 55 Pac. Rep. 522 (1898).

CARPENTER v. LONGAN

SUPREME COURT OF THE UNITED STATES, 1872

(16 Wall. 271)

APPEAL from the Supreme Court of Colorado Territory.

MR. JUSTICE SWAYNE stated the case, and delivered the opinion of the court.—On the 5th of March, 1867, the appellee, Mahala Longan, and Jesse B. Longan, executed their promissory note to Jacob B. Carpenter, or order, for the sum of \$980, payable six months after date, at the Colorado National Bank, in Denver City, with interest at the rate of three and a half per cent. per month until paid. At the same time Mahala Longan executed to Carpenter a mortgage upon certain real estate therein described. The mortgage was conditioned for the payment of the note at maturity, according to its effect. On the 24th of July, 1867, more than two months before the maturity of the note, Jacob B. Carpenter, for a valuable consideration, assigned the note and mortgage to B. Platte Carpenter, the appellant. The note not being paid at maturity, the appellant filed this bill against Mahala Longan, in the District Court of Jefferson County, Colorado Territory, to foreclose the mortgage.

She answered and alleged that when she executed the mortgage to Jacob B. Carpenter she also delivered to him certain wheat and flour, which he promised to sell, and to apply the proceeds to the payment of the note; that at the maturity of the note she had tendered the amount due upon it, and had demanded the return of the note and mortgage and of the wheat and flour, all which was refused. Subsequently she filed an amended answer, in which she charged that Jacob B. Carpenter had converted the wheat and flour to his own use, and that when the appellant took the assignment of the note and mortgage, he had full knowledge of the facts touching the delivery of the wheat and flour to his assignor. Testimony was taken upon both sides. It was proved that the wheat and flour were in the hands of Miller & Williams, warehousemen, in the city of Denver, that they sold, and received payment for a part, and that the money thus received and the residue of the wheat and flour were lost by their failure. The only question made in the case was, upon whom this loss should fall, whether upon the appellant or the appellee. The view which we have taken of the

case renders it unnecessary to advert more fully to the facts relating to the subject. The District Court decreed in favor of the appellant for the full amount of the note and interest. The Supreme Court of the Territory reversed the decree, holding that the value of the wheat and flour should be deducted. The complainant thereupon removed the case to this court by appeal.

It is proved and not controverted that the note and mortgage were assigned to the appellant for a valuable consideration before the maturity of the note. Notice of anything touching the wheat and flour is not brought home to him.

The assignment of a note underdue raises the presumption of the want of notice, and this presumption stands until it is overcome by sufficient proof. The case is a different one from what it would be if the mortgage stood alone, or the note was non-negotiable, or had been assigned after maturity. The question presented for our determination is, whether an assignee, under the circumstances of this case, takes the mortgage as he takes the note, free from the objections to which it was liable in the hands of the mortgagee. We hold the affirmative. (Powell on Mortgages, 908; 1 Hilliard on Mortgages, 572; Coote on Mortgages, 304; *Reeves v. Scully*, Walker's Chancery, 248; *Fisher v. Otis*, 3 Chandler, 83; *Martineau v. McCollum*, 4 *id.* 153; *Bloomer v. Henderson*, 8 Mich. 395; *Potts v. Blackwell*, 4 Jones, 58; *Cicotte v. Gagnier*, 2 Mich. 381; *Pierce v. Faunce*, 47 Maine, 507; *Palmer v. Yates*, 3 Sandford, 137; *Taylor v. Page*, 6 Allen, 86; *Croft v. Bunster*, 9 Wis. 503; *Cornell v. Hitchens*, 11 *id.* 353.) The contract as regards the note was that the maker should pay it at maturity to any *bona fide* indorsee, without reference to any defences to which it might have been liable in the hands of the payee. The mortgage was conditioned to secure the fulfilment of that contract. To let in such a defence against such a holder would be a clear departure from the agreement of the mortgagor and mortgagee, to which the assignee subsequently, in good faith, became a party. If the mortgagor desired to reserve such an advantage, he should have given a non-negotiable instrument. If one of two innocent persons must suffer by a deceit, it is more consonant to reason that he who "puts trust and confidence in the deceiver should be a loser rather than a stranger." (*Hern v. Nichols*, 1 Salkeld, 289.)

Upon a bill of foreclosure filed by the assignee, an account must be taken to ascertain the amount due upon the instrument secured by the mortgage. Here the amount due was the face of the note and interest, and that could have been recovered in an action at

law. Equity could not find that less was due. It is a case in which equity must follow the law. A decree that the amount due shall be paid within a specified time, or that the mortgaged premises shall be sold, follows necessarily. Powell, cited *supra*, says: "But if the debt were on a negotiable security, as a bill of exchange collaterally secured by a mortgage, and the mortgagee, after payment of part of it by the mortgagor, actually negotiated the note for the value, the indorsee or assignee would, it seems, in all events, be entitled to have his money from the mortgagor on liquidating the account, although he had paid it before, because the indorsee or assignee has a legal right to the note and a legal remedy at law, which a court of equity ought not to take from him, but to allow him the benefit of on the account."

A different doctrine would involve strange anomalies. The assignee might file his bill and the court dismiss it. He could then sue at law, recover judgment, and sell the mortgaged premises under execution. It is not pretended that equity would interpose against him. So, if the aid of equity were properly invoked to give effect to the lien of the judgment upon the same premises for the full amount, it could not be refused. Surely such an excrescence ought not to be permitted to disfigure any system of enlightened jurisprudence. It is the policy of the law to avoid circuity of action, and parties ought not to be driven from one forum to obtain a remedy which cannot be denied in another.

The mortgaged premises are pledged as security for the debt. In proportion as a remedy is denied, the contract is violated, and the rights of the assignee are set at naught. In other words, the mortgage ceases to be security for a part or the whole of the debt, its express provisions to the contrary notwithstanding. The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity. (*Jackson v. Blodget*, 5 Cowen, 205; *Jackson v. Willard*, 4 Johnson, 43.)

It must be admitted that there is considerable discrepancy in the authorities upon the question under consideration. In *Baily v. Smith et al.*, 14 Ohio State, 396—a case marked by great ability and fulness of research—the Supreme Court of Ohio came to a conclusion different from that at which we have arrived. The judgment was put chiefly upon the ground that notes negotiable are made so by statute, while there is no such statutory provision as to mortgagees, and that hence the assignee takes the latter, as he would any other chose in action, subject to all the equities which subsisted

against it while in the hands of the original holder. To this view of the subject there are several answers.

The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter. If not assignable at law, it is clearly so in equity. When the amount due on the note is ascertained in the foreclosure proceeding, equity recognizes it as conclusive, and decrees accordingly. Whether the title of the assignee is legal or equitable is immaterial. The result follows irrespective of that question. The process is only a mode of enforcing a lien.

All the authorities agree that the debt is the principal thing and the mortgage an accessory. Equity puts the principal and accessory upon a footing of equality, and gives to the assignee of the evidence of the debt the same rights in regard to both. There is no departure from any principle of law or equity in reaching this conclusion. There is no analogy between this case and one where a chose in action standing alone is sought to be enforced. The fallacy which lies in overlooking this distinction has misled many able minds, and is the source of all the confusion that exists. The mortgage can have no separate existence. When the note is paid the mortgage expires. It cannot survive for a moment the debt which the note represents. This dependent and incidental relation is the controlling consideration, and takes the case out of the rule applied to choses in action, where no such relation of dependence exists. *Accessorium non ducit, sequitur principale*.

In *Pierce v. Faunce*, 47 Maine, 513, the court say: "A mortgage is *pro tanto* a purchase, and a *bona fide* mortgagee is equally entitled to protection as a *bona fide* grantee. So the assignee of a mortgage is on the same footing with the *bona fide* mortgagee. In all cases the reliance of the purchaser is upon the record, and when that discloses an unimpeachable title he receives the protection of the law as against unknown and latent defects."

Matthews v. Wallwyn, 4 Vesey, 126, is usually much relied upon by those who maintain the infirmity of the assignee's title. In that case the mortgage was given to secure the payment of a non-negotiable bond. The mortgagee assigned the bond and mortgage fraudulently and thereafter received large sums which should have been credited upon the debt. The assignee sought to enforce the mortgage for the full amount specified in the bond. The Lord Chancellor was at first troubled by the consideration that the mortgage deed purported to convey the legal title, and seemed inclined to think that might take the case out of the rule of liability which

would be applied to the bond if standing alone. He finally came to a different conclusion, holding the mortgage to be a mere security. He said, finally: "The debt, therefore, is the principal thing; and it is obvious that if an action was brought on the bond in the name of the mortgagee, as it must be, the mortgagor shall pay no more than what is really due upon the bond; if an action of covenant was brought by the covenantee, the account must be settled in that action. In this court the condition of the assignee cannot be better than it would be at law in any mode he could take to recover what was due upon the assignment." The principle is distinctly recognized that the measure of liability upon the instrument secured is the measure of the liability chargeable upon the security. The condition of the assignee cannot be better in law than it is in equity. So neither can it be worse. Upon this ground we place our judgment. We think the doctrine we have laid down is sustained by reason, principle, and the greater weight of authority.

Decree reversed.¹

TRUSTEES OF UNION COLLEGE v. WHEELER

COMMISSION OF APPEALS OF NEW YORK, 1874

(61 N. Y. 88) ²

APPEAL from so much of the judgment of the General Term of the Supreme Court, in the fourth judicial department, as affirms in part a judgment dismissing the plaintiff's complaint, entered on the report of the referee. (Reported below 5 Lans. 160; 59 Barb. 385.)

This action was brought to foreclose a mortgage executed by Philo Stevens to Benjamin Nott, to secure the payment of \$2,800. It bears date July 18th, 1833, and was recorded August 8th, 1833. It covered, when given, four pieces of land, viz.: three in the then

¹ *Fisher v. Otis*, 3 Chand. (Mich.) 83 (1850); *Dutton v. Ives*, 5 Mich. 515 (1858); *Croft v. Bunster*, 9 Wis. 503 (1859); *Gould v. Marsh*, 1 Hun. (N. Y.) 566 (1874); *Duncan v. Louisville*, 13 Bush (Ky.) 378 (1877); *Bassett v. Daniels*, 136 Mass. 547 (1884); *Paige v. Chapman*, 58 N. H. 333 (1878), *accord*. But see *Franklin*

v. Twogood, 18 Iowa, 515 (1865); *Elias Breving Co. v. Boeger*, 74 Misc. (N. Y.) 547 (1911).

² The report of this case is much abbreviated, the opinion of LOTT, Ch. C., and considerable portions of the opinions of DWIGHT, C., being omitted.

village of Oswego and a large tract in the town Scriba. The mortgage was assigned by Nott to the plaintiff by an assignment bearing date the 1st day of July, 1834, which was recorded on the 25th day of December, 1852.

The complaint, after stating the above facts, further states that a portion of the mortgaged premises, being two of the parcels of land in Oswego, had been released from the lien of the mortgage, and as to them the plaintiff made no claim, but alleged that the residue remained subject thereto.

Several of the defendants answered and set up that they were owners of different portions of the lands lying in Scriba, which they claimed were not subject to the lien of the plaintiff's mortgage, having been discharged by the transactions referred to in the opinions. The issues were referred to a referee, who dismissed the plaintiff's complaint.

The General Term on appeal reversed the judgment, so far as it related to most of the mortgaged premises, but affirmed it as to the residue. The further facts are set forth at length in the opinions.

DWIGHT, C. The facts of this case show that on October 1st, 1828, one Mellen conveyed a large tract of land, including the premises in question, to Chauncey B. Aspinwall. The consideration for the land was paid by Aspinwall, Phila Stevens and Benjamin Nott, in equal portions, and each was equally interested in the property.

Aspinwall, by deed bearing date January 26, 1830, conveyed an undivided two-thirds part of the property to Stevens, for the consideration of \$2,000. While Aspinwall held the property he executed contracts of sale of portions of the land to a number of distinct purchasers, in his own name, for the benefit of himself and Stevens and Nott, to whom he accounted from time to time for the proceeds of sales. After the conveyance to Stevens sales were made of other portions, the contracts being executed by Aspinwall and Stevens, and the proceeds being accounted for to Nott, as before.

While matters stood in this condition, Nott, by a quit-claim deed dated July 18, 1833, in consideration of one dollar, conveyed to Stevens all the lands described in the deed from Mellen to Aspinwall, and also village lots in Oswego, of which two-thirds belonged to Nott and one-third to Stevens. Stevens, by mortgage bearing date the same day with the last mentioned deed, mortgaged to Nott the property conveyed to Aspinwall by Mellen, whether under con-

tract or not, and also the village property above referred to, to secure the payment of \$2,800, with interest semi-annually. The mortgage was payable in five years from date, was accompanied by Stevens' bond, and duly recorded August 8, 1833.

The bond and mortgage were assigned to the plaintiff July 1, 1834, for the sum of \$2,790.87, which was then paid to Nott. The execution of the assignment was proved by a subscribing witness, December 17, 1853, and the assignment recorded on the twentieth of the same month and year. While the mortgage, in form, covered the entire property sold to Aspinwall, yet it was conceded, on the trial, that some portions of it had been actually conveyed before the execution of the mortgage, and to this no claim was made by the plaintiff.

It will be observed, from the facts already detailed, that upward of nineteen years elapsed between the execution of the assignment and its record. Within this period, on March 28, 1836, Nott, still assuming to be the owner of the mortgage, released to Stevens some of the village lots embraced in the mortgage, who conveyed them to purchasers about the time that the releases were executed. It appeared that the lots so released were more than sufficient in value, at that time, to pay the mortgage. The purchasers under Stevens had no notice of the assignment to the plaintiff.

There is still due and unpaid on the mortgage the principal sum of \$2,800, with interest from January 1st, 1864, amounting on December 3d, 1870, to \$4,157.28.

The questions raised on the present appeal, under this state of facts are: First. Whether the lien of the mortgage is superior to the claims of the purchasers under the contracts. Second. If the plaintiff is bound by the contracts, whether it is not entitled to the purchase-money unpaid upon them. Third. Whether the release of the village lots by Nott does not, as between the purchasers and the plaintiff, discharge their lots from the lien of the mortgage?

1. In considering the first question it will be necessary, at the outset, to examine the relations between Aspinwall and Nott, as well as between the latter and Stevens. When Aspinwall took the title, the common law of trusts was in full operation; he undoubtedly held the property as a trustee, both for Nott and Stevens. In other words, the payment of a portion of the consideration by each of these parties caused a trust *pro tanto* to result in their favor. This could be proved by parol evidence. (2 Washburn on Real Property, 176, par. 17, and cases cited.) When Aspinwall conveyed to Stevens he transferred an estate to him charged with

a valid existing trust, of which Stevens had full knowledge. Stevens, according to elementary rules, became himself a trustee for Nott to the extent of the interest conveyed to him. (1 Spence's Eq. Jur. 512; Willis on Trustees, 64; 2 Washb. 178, par. 21.)

During the whole period from October 1, 1828, to the time of the execution of the mortgage, the relation of trustee and *cestui que trust* existed between Aspinwall and Nott, or Stevens and Nott. These trustees were accountable to Nott in a court of equity. They had the management of the estate, had the legal power to sell, and their acts were acquiesced in by the *cestui que trust* and ratified by the accountings held from time to time. Under these circumstances the purchasers under the contracts had an equity superior to that of Nott. At the moment when he conveyed to Stevens, they could have enforced the agreements against him, on payment of the residue of the purchase-money, and against Stevens, his successor in interest. Nott and Stevens held the legal title, as trustees for the purchasers under the contracts.

The sale by Nott to Stevens and the execution of the mortgage to the former worked no change in this state of things. At the moment of sale he was a trustee for the purchasers under the contract. By a familiar rule in the law of trusts he could not buy or sell to the prejudice of the *cestuis que trusts*. His sale to Stevens, and taking back a mortgage for the purchase-money, left him precisely where he was before the transaction was entered into—still charged with the execution of the trust in favor of the purchasers under the contracts. It was, therefore, quite immaterial, as far as Nott was concerned, to show that he had constructive notice of the contracts by the possession of the purchasers. His duty toward them did not depend upon notice, but upon the inherent equities of the case. Suppose that after he had sold to Stevens he had immediately repurchased from him; would he not have been subject to the same equities as he was liable to before the sale? The authorities are distinct that he would.

A mortgage could give him no more rights than an absolute purchase. It is thus clear that if Nott had remained owner of the mortgage of July 18, 1833, and had sought to foreclose it, he would have been bound by the same equities as before his sale of that date, and would have been required to allow the claims of the purchasers under the contract.

Does the plaintiff occupy the position of Nott, or can it urge that it is a purchaser in good faith, and for value, and thus shut out the equities between the contractees and Nott, or is it governed by

the rule that the assignee of a mortgage takes subject to the equities between the original parties? According to the reasoning thus far, this is a case of an inherent equity as between a person having an interest in the equity of redemption and the mortgage. The mortgage, in form, covers the property claimed by the contractees; if they do not fulfill the contract, it certainly embraces it in full. What they say to the mortgagee is this: "Owing to certain equities between us and you, it is inequitable to enforce the mortgage against property which, as a matter of law, is actually covered by it, except you respect our rights."

Is, then, the plaintiff in any better position than Nott, the mortgagee? It is well settled that an assignee of a mortgage must take it subject to the equities attending the original transaction. If the mortgagee cannot himself enforce it, the assignee has no greater rights. The true test is to inquire what can the mortgagee do by way of enforcement of it against the property mortgaged; what he can do the assignee can do, and no more. In *Clute v. Robison*, 2 J. R. 612, the rule, as stated by Kent, Ch. J., is, that a mortgage is liable to the same equity in the hands of the assignee that existed against it in the hands of the obligee. (2 Vern. 692, 765; 1 Vesey, 122.) The rule is not simply that the assignee takes subject to the equities between the original parties, though that is sound law. (*Ingraham v. Disborough*, 47 N. Y. 421.) It goes further than this, and declares that the purchaser of a chose in action must always abide by the case of the person from whom he buys. (*Per* Lord Thurlow, in *Davies v. Austen*, 1 Vesey, Jr., 247.) The reason of the rule is, that the holder of a chose in action cannot alienate anything but the beneficial interest he possesses. It is a question of power or capacity to transfer to another, and that capacity is to be exactly measured by his own rights. (*Beebe v. Bank of New York*, 1 J. R. 552, *per* Spencer, J., and 549, *per* Tompkins, J.) Kent, Ch. J., in a dissenting opinion in the same case, would have confined the rule to the equities between the original parties to the contract. (*Id.* 573.) The opinions of Spencer and Tompkins, JJ., were, however, recognized as the correct exposition of the law in *Bush v. Lathrop*, 22 N. Y. 535. A considerable number of authorities are cited by the plaintiff as tending to show that the assignee of a chose in action is only subject to the equities between the contractor (assignor) and the debtor, and not to the so-called latent equities of third persons. Such cases as *James v. Morey*, 2 Cowen, 298, opinion of Sutherland, J.; *Bloomer v. Henderson*, 8 Mich. 402; *Mott v. Clarke*, 9 Barr, 404, and others of the same class, were

reviewed as to their principle or specifically in *Bush v. Lathrop*, 22 N. Y. 535, and repudiated. The doctrine of Lord Thurlow, in England, and of Spencer and Tompkins, JJ., already considered, was thus adopted rather than that of Kent, Ch. J. The law of some of the other states undoubtedly coincides with the views of Kent, but, since the decision in *Bush v. Lathrop*, must be regarded as without authority here.

✓ The correct theory is well stated in 2 Story on Equity Jurisprudence, section 1040: "Every assignment of a chose in action is considered in equity as in its nature amounting to a declaration of trust and to an agreement to permit the assignee to make use of the name of the assignor in order to recover the debt or to reduce the property into possession." This theory would lead to the conclusion that the action by the assignee must be precisely commensurate with that of the assignor, as it must be in his name and on the supposition that, for the purposes of the action, he is still owner. The case of *Dillaye v. Commercial Bank of Whitehall*, 51 N. Y. 345, is not opposed to this view, as the question in that case was not one of the enforcement of a mortgage, but concerned the title of the two claimants to the ownership of the mortgage itself. The point was, whether one who held a mortgage in trust, with an apparently unrestricted power of disposition, could transfer it free from the claims of the *cestui que trust* to a purchaser in good faith. It was held that he could. This case has no tendency to establish any right on the part of the assignee in enforcing the mortgage beyond that possessed by his assignor.

The plaintiff cites, to support his view, authorities to the effect that an assignee is a purchaser, and to the effect that "a mortgage is in form a conveyance of the land and an assignment of it is another conveyance of the same land." These cases, which are very numerous in the law books, refer only to the position of a mortgagee or assignee in a court of law, and were decided in England and in States of the Union where more technical views of the rights of a mortgagee in a court of law prevail than in this State. They are of no force in a court of equity, in which the case at bar is assumed to be pending, for in such a tribunal a mortgage is but a chose in action and security for a debt. Reference is also made to a class of cases appearing in the law reports of a number of the States, holding, in substance, that when a mortgage is given to secure a negotiable note, which is itself transferred before maturity for value, it is taken by the assignee free from all equities. It is argued that these authorities tend to show that the mortgage par-

takes of the nature of the debt, in such a sense that only the direct equities between the debtor and the creditor can be set up as against the assignee. These cases have not yet become established law in this State. (*Carpenter v. Longan*, 16 Wall. [U. S.] 271; *Kenicott v. Supervisors*, *id.* 452; *Taylor v. Page*, 6 Allen, 86; *Croft v. Bunster*, 9 Wis. 510.) If sound, they must be made to rest on rules of law attending the transfer of negotiable paper, and cannot be held by indirection to overthrow a rule concerning the ordinary bond and mortgage which has become fixed in our jurisprudence.

The result is that the plaintiff in the present case takes subject to the rights of the purchasers under the contracts, by reason of the equities between them and Nott and without reference to any actual or even constructive notice of such equities as between such purchasers and the mortgagee. . . .

The judgment of the court below should be affirmed.

All concur.

A motion having been made for reargument, the following opinion was given, on denying the motion.

DWIGHT, C. The plaintiff in this cause moves for a reargument on three grounds: First. That this court erred in holding that the plaintiff took the same position in respect to the mortgage which was the subject of foreclosure in the present action as its assignor, Nott, the mortgagee. Second. That the court should have held that, where the contracts owned by the respondents were assigned subsequent to the record of the mortgage, the plaintiff has a lien for the purchase-money unpaid at the time of such assignment. Third. That the court committed another error in holding that after Nott had made the assignment and continued the apparent owner, the assignment being unrecorded, and the respondents having no notice of such assignment, his release from the lien of the mortgage of certain portions of the premises which were primarily liable to pay the debt, was binding on the plaintiff and so discharged the respondents.

Before considering the first proposition, it will be well to recall the exact relations of the parties. Nott held a mortgage upon certain lands to which the mortgagor held the legal title, but which in part had been sold by a valid contract to some of the defendants. The validity of the contract is undisputed, as is also the fact that Nott, the mortgagee, had full notice of the equities of those defendants, and was bound in equity to recognize them.

Starting with this proposition, the counsel for the plaintiff main-

tains that the plaintiff, if considered as a purchaser of a chose in action without notice, is not bound to recognize the equities to which Nott would have been subject; and again, that it is a purchaser of the legal title to the land, and that it can invoke the rule that the honest purchaser of land for a valuable consideration can shut out any equities which might have existed between the mortgagor, as well those whom he represented, and the mortgagee.

✓ In urging the first branch of this proposition, he calls our attention to the supposed fact that the case of *Bush v. Lathrop*, 22 N. Y. 535, and cited as authority in one of the opinions disposing of this cause, has been overruled, and with it, that the doctrine on which we relied has fallen. This, however, is an incorrect assumption, for that case has not been overruled as a whole, but only as to one proposition maintained in it. See *Moore v. Metropolitan Bk.*, 55 N. Y. 41. It is there stated that several propositions in *Bush v. Lathrop* were decided "with perfect accuracy." The special point in respect to which there is a conflict between the two cases is, whether an assignor of a chose in action can set up any equities affecting the title between himself and his assignee, in an action brought by a second assignee. There was no question whatever as to the equities growing out of the chose in action itself, as between the original parties to it or an assignee of the creditor. On that point the court was careful to avoid all misconstruction in using the following language: "The counsel" (for the defendant) "further insists that to apply the same rule" (of estoppel) "to non-negotiable choses in action will in effect make them negotiable. Not at all. No one pretends but that the purchaser will take the former, subject to all defences, valid as to the original parties, nor that the mere possession is any more evidence of title in the possessor than is that of a horse. In both respects, the difference between these and negotiable instruments is vital." (P. 48.) The court is also careful, on pages 49, 50 of the report, to preserve the force of the cases, decided by the present Court of Appeals, which have followed *Bush v. Lathrop* in the respect referred to—cases of which *Schafer v. Reilly*, 50 N. Y. 61, is one, and bears closely upon the present discussion. The point in *Moore v. Metropolitan Bank* is simply whether the law of estoppel is applicable on the question of title as between a first assignee and a remote purchaser of a non-negotiable chose in action. It is held that it is. The rule that the chose in action itself is open to all defenses growing out of the original transaction, in the hands of any assignee, no matter how

remote, remains unshaken, and must continue so until elementary rules of law are overthrown.

The rule laid down by us in the case at bar is distinctly stated and affirmed in *Schafer v. Reilly*, 50 N. Y. 61. It is there said that one who takes an assignment of a mortgage takes it subject not only to any latent equities that exist in favor of the mortgagor, but also subject to the like equities in favor of third persons. This case emphatically approves of *Bush v. Lathrop*, so far as it holds this point, and declares its doctrine to be settled law. None of the cases, we repeat, in which the present Court of Appeals have followed that case, are to be regarded as overruled by *Moore v. Metropolitan Bank*, *supra*. It must accordingly be held to be still the law of this State, that the purchaser of a non-negotiable chose in action, secured by a mortgage, takes it subject to the latent equities not only of the mortgagor but of third persons. ✓

The counsel of the plaintiff, however, maintains that if it be conceded that this doctrine applies to the debt it does not apply to the mortgage. His argument is, that the mortgage itself creates a legal estate in the land, and that so far as the land is concerned, an assignee of a mortgage is a purchaser of the legal estate for a valuable consideration, and entitled to exclude the equities. There is thus, according to this proposition, one rule for the land and another for the debt. If the debt were collected by action for its amount the equities would be let in; if it were collected by foreclosure of the mortgage they would be shut out. This, if true, is certainly an extraordinary proposition. It is very comprehensive in its nature, for it would exclude the equities of the mortgagor as well as the latent equities of third persons. Under our compound system of foreclosure and of obtaining a personal judgment for the deficiency, there would be one rule for the first branch of the case and an entirely different one for the last. |||

None of the cases cited by the counsel, on this motion for re-argument, sustain his proposition as being part of our law. They have all been examined, and it is unnecessary to consider them in detail. The point is really decided against him in *Schafer v. Reilly*, *supra*. The contest in that case concerned the right to surplus moneys after a foreclosure, and was in substance a question as to the title to land, the money standing, under the doctrine of equitable conversion, in the place of land. It appeared that there was a second mortgage, of a fictitious nature, made by one John Reilly to Peter Reilly, on which nothing had been advanced, and which was of course incapable of enforcement by Peter. This

was assigned to one Catherine M. Burchard, who paid a valuable consideration, acting in good faith, and upon an affidavit by the mortgagor that Peter Reilly had advanced to him the whole amount of the principal without abatement, that the whole sum remained unpaid, and that there was no off-set, defence or counter-claim to the mortgage. The mortgage was dated and executed anterior to the claim of one Griffin, who had acquired, subsequently, a mechanic's lien upon the land, but before Mrs. Burchard became assignee. Of his rights at that time she was ignorant. The question was, who had, under these circumstances, the better right to the surplus moneys, considered as land. The court held that, notwithstanding the mortgage was, on its face, executed prior to the mechanic's lien, it might be shown by Griffin that his lien was in existence when Mrs. Burchard advanced her money, and that his right could not be affected by the mortgage. The court there broadly applied the rule, that if Griffin's claim was an equitable one and latent, it could still be set up by him against the assignee. The estoppel against John Reilly, caused by his affidavit, had no effect upon the rights of Griffin. The court rested this decision on the ground that though Griffin's right might be a latent equity, yet the assignee must take the mortgage considered as an interest in the land, and not merely the debt, subject to the equity. The same class of cases that were relied upon by the plaintiff's counsel in the argument of the present motion were cited to the court, as showing that the assignee of the mortgage was a purchaser for value. Their application to the subject in hand was denied, and the rule of Lord Thurlow, in *Davies v. Austen*, 1 Ves. 247, was pronounced to be the principle governing the case. "A purchaser of a chose in action must always abide by the case of the person from whom he buys." (*Schafer v. Reilly*, 50 N. Y. 67, 68.) This was the precise ground on which the case at bar was rested.

The plaintiff is mistaken in the supposition that the present case is one merely of notice of equitable rights on the part of third parties to Nott, the mortgagee, and, accordingly, that it is not bound by the notice under the ordinary doctrines applied to the purchaser in good faith, and for a valuable consideration, acquiring title to lands. On the contrary, the difficulty is that Nott took his mortgage, subject to the older and better title of the contractees. To their estate his mortgage never attached in equity. The land belonged to them in equity, and the most that Nott could acquire under any circumstances, as against them, was a lien for the un-

paid purchase-money. This is not an interest in the land but only in the money, and to be obtained by an assignee of Nott in no manner, except by due notice of the mortgage and assignment given to the contractees. The plaintiff simply acquired Nott's rights, and stood in his place, according to *Schafer v. Reilly*, *supra*. (See also *Andrews v. Torrey*, 1 McCarter [N. J.] 355.) The cases of *Jackson v. Van Valkenburgh*, 8 Cow. 260; *Jackson v. Henry*, 10 J. R. 185; *Varick v. Briggs*, 6 Paige, 323; *Fort v. Burch*, 5 Den. 187, and others cited by the appellant, have no application to the case at bar. Those and others of the same nature are either cases of title obtained by fraud, or involve the effect of notice under the recording acts, or are instances of mortgages accompanying negotiable notes, and declared to partake of the character of the note. They are noticed and distinguished in *Schafer v. Reilly*, *supra*, and it is unnecessary to spend time upon them.

It should be added that, under the rules of equity jurisprudence, it is essential that one who claims to exclude an earlier equity must show that he is not only a purchaser, but has acquired the legal estate. What evidence was there, in the case at bar, that the plaintiff had acquired the legal estate? The complaint merely alleges an assignment of the debt and mortgage in writing. The referee only finds an assignment in writing. There is not a word anywhere concerning the acquisition of the mortgage by a deed or other instrument under seal. If the mortgagee had the "legal" estate, he did not transfer it by such an instrument as the law requires to transfer a freehold estate in land. The plaintiff was, undoubtedly, the equitable owner, by force of the assignment of the bond and the mortgage accompanying it, but that was not enough. The legal title must pass. (*Peabody v. Fenton*, 3 Barb. Ch. 451.) The authorities, to the effect that a deed or other mode of conveyance is necessary to pass the legal estate, strongly preponderate. (*Den v. Dimon*, 5 Halst. [N. J.] 156; *Warden v. Adams*, 15 Mass. 233; *Jackson v. Myers*, 11 Wend. 533, 539; *Morrison v. Mendenhall*, 18 Minn. 232; *Cottrell v. Adams*, 2 Bissell, 351; *Olds v. Cummings*, 31 Ill. 188; *Partridge v. Partridge*, 38 Penn. St. 78; *Graham v. Newman*, 21 Ala. 497; *Lyford v. Ross*, 33 Me. 197; *Smith v. Kelley*, 27 *id.* 237; *Givan v. Tout*, 7 Blackf. 210; 2 Washburn on Real Property [3d ed.] page 113, paragraphs 12 and 16, and cases cited.) Such cases as *Green v. Hart*, 1 J. R. 590; *Jackson v. Blodget*, 5 Cow. 202, and *Jackson v. Willard*, 4 J. R. 43, do not affect this question, as the matter of passing the legal title to the mortgage was not in controversy. *Johnson v. Hart*, 3 J. Cas. 322, only decides that

by the transfer of the debt an equitable title to the mortgage passes.

It is, however, not our intention to hold that the legal estate, under the present law of this State, ever does or can pass from the mortgagee to the assignee. On the other hand, it is now settled law that the mortgage is but a lien upon the land. The mortgagor, both in law and equity, is regarded as the owner of the fee, and the mortgage is a mere chose in action, a security of a personal nature. An assignment of a mortgage, in this view, cannot pass the title. (*Jackson v. Myers*, 11 Wend. 533, 539; *Kortright v. Cady*, 21 N. Y. 343; *Trimm v. Marsh*, 54 *id.* 599, 604; *Stoddard v. Hart*, 23 *id.* 559, 560; *Power v. Lester*, *id.* 527.) Rules owing their existence to a contrast between law and equity, and giving the later holder of a legal title a preference over an earlier holder of an equitable title, are not to be applied to a state of the law so entirely different from that which prevailed when the law of mortgages first originated. In other words, the power of a vendee of land to convey to a second purchaser, so as to shut out the equities between himself and the original vendor, is not to be referred to for the purpose of ascertaining the capacity of a mortgagee when he makes an assignment of the mortgage to shut out the equities between himself and the mortgagor, and those whom the mortgagor represents. If that rule were ever a part of the law of mortgages, the development of that branch of jurisprudence in this State demands that it should be discarded. . . .

The motion for reargument is denied.

All concur.¹

MERCHANTS' BANK OF BUFFALO v. WEILL

COURT OF APPEALS OF NEW YORK, 1900

(163 N. Y. 486)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 24, 1898, upon an order reversing a judgment in favor of defendant entered upon a decision of the court on trial at an Equity Term, and granting a new trial.

This was an action to foreclose a bond and mortgage and to

¹ And see *Elias Brewing Co. v. Boeger*, 74 Misc. (N. Y.) 547 (1911), *per* CRANE, J.

recover judgment for a deficiency against the defendant Louis Weill, as obligor upon the bond, if any such should arise upon a sale in foreclosure.

The facts are not in dispute. The firm of Thorne & Angell owned a plot of land in the city of Buffalo, the legal title to which was vested in Angell, who held it for the benefit of the firm. On November 5th, 1890, Angell conveyed the land to Louis Weill, for the consideration of \$8,302, of which the sum of \$2,302 was paid in cash. The balance was secured to be paid by the bond of Louis Weill, by which he bound himself to pay to his grantor, or to his representatives or assigns, the sum of \$6,000, with interest. As collateral security for the payment of the said indebtedness mentioned in the bond, Weill, at the same time, executed a mortgage to Angell upon the premises conveyed. On January 23rd, 1891, Angell assigned the said bond and mortgage to this plaintiff, as a collateral security for the payment of any and all promissory notes made and indorsed by Thorne & Angell and discounted or cashed for them by the plaintiff and for any and all renewals thereof, or any part thereof. This assignment was duly recorded in the proper office. At the time of the execution of the assignment, the plaintiff was the owner and holder of commercial paper upon which Thorne & Angell were liable either as makers or indorsers. This paper was renewed from time to time thereafter and other discounts were made by the plaintiff of paper, upon which Thorne & Angell were liable, either as makers or indorsers, and their indebtedness, when this action was commenced, largely exceeded the amount due upon the mortgage held as security. Concurrently with the execution of the bond and mortgage mentioned, an agreement in writing was made between Thorne & Angell and Weill, by the terms of which it was agreed that said Weill at any time within two years from the date thereof might elect to reconvey said premises to Thorne & Angell and that, upon such reconveyance, Thorne & Angell would pay to Weill all moneys paid by him to apply upon the purchase of the land, together with all interest paid by him upon the mortgage, etc., and, further, would release him from every obligation incurred by him with reference to the property. This agreement was not recorded; nor was any notice thereof given to, or had by, the plaintiff.

After the assignment to the plaintiff of the bond and mortgage, Weill was notified of its having been made, within a short time, and upon one occasion, in May, 1891, he paid the interest at the plaintiff's bank. On April 30th, 1892, Weill executed and delivered

to Thorne & Angell a conveyance of the premises described in the mortgage and Thorne & Angell paid to him all the sums of money, which they had agreed to pay to him in such event under the agreement hereinbefore referred to. In this conveyance Thorne & Angell, the grantees, assumed the mortgage which had been given and agreed to pay the same.

Weill's defense to the plaintiff's complaint in foreclosure was based upon the agreement, which gave to him the right within two years to rescind the purchase and to reconvey the premises to Thorne & Angell; by which reconveyance, as he claims, his bond was discharged.

The case was tried before the court without a jury and the trial court, holding that Weill's reconveyance was made in good faith and in pursuance of the contract made between him and Thorne & Angell, reached the legal conclusion that Weill was not liable for any deficiency which might arise upon a sale of the mortgaged premises. Upon appeal to the Appellate Division, so much of the judgment entered at the Trial Term as was in favor of the defendant Weill was reversed and a new trial of the action was ordered. From that order of reversal, and from the judgment entered thereupon, the defendant Weill appealed to this court; giving the usual stipulation for judgment absolute in the event of affirmance.

GRAY, J. The claim of the appellant Weill is that, upon the facts, which are uncontroverted, the bank took an assignment of the bond and mortgage from Thorne & Angell, the mortgagees, subject to all the equities attending the original transaction and that it must abide by the case of its assignors; who could not alienate anything but the beneficial interest which they possessed, and who were bound by the private collateral agreement. The doctrine which he invokes is that early asserted in *Bush v. Lathrop*, (22 N. Y. 535), and which the cases since then have reiterated. (*Trustees of Union College v. Wheeler*, 61 N. Y. 112; *Green v. Warnick*, 64 *ib.* 220; *Bennett v. Bates*, 94 *ib.* 354; *Hill v. Hoole*, 116 *ib.* 299.) They hold that the assignee of a mortgage takes it subject to all the defenses which were valid between the original parties and this principle was borrowed from Lord THURLOW's rule in *Davies v. Austen* (1 Ves. Jr. 247). Within its legitimate application, its correctness has not been disputed in this court; but, because of the broadness of its intended application in *Bush v. Lathrop*, it was soon found necessary to place limitations upon the authority of that case in the decisions in *McNeil v. Tenth National*

Bank (46 N. Y. 325), and in *Moore v. Metropolitan Nat. Bank* (55 *ib.* 41). They overruled *Bush v. Lathrop* in the application of the principle to its own state of facts and held that a *bona fide* purchaser for value of a non-negotiable chose in action from one upon whom the owner has, by assignment, conferred the apparent absolute ownership, where the purchase is made upon the faith of such apparent ownership, obtains a valid title as against the real owner. The decision in the latter case was based upon the doctrine of estoppel, which will preclude the real owner from asserting his title against a *bona fide* purchaser from one upon whom he has conferred apparent ownership and apparent absolute authority to convey. (*Green v. Warnick, supra.*) The doctrine of *Bush v. Lathrop* was so broad as to be inequitable in applying a principle otherwise correct and undisputed to cases such as those of shares of corporations, or other personal property, where the legal title being capable of transfer by assignment, the true owner has apparently conferred upon another the full power of disposition.

I do not think that the rule, upon which the appellant relies, applies to the facts of the present case, and that it relates, as Mr. Justice FOLLETT observed of it, in rendering the opinion which prevailed below, "to defenses arising out of matters inherent in the contract by which the chose in action is evidenced and existing before it is assigned." When this assignment was made, there was no defense to the mortgage. It was a subsisting and valid obligation for the amount expressed as owing by Weill and his present defense to the enforcement of his liability arises from his exercising an option, conferred by an unrecorded and collateral agreement, to rescind the sale of the property and thus to be relieved from the obligation growing out of it. But this could not be said to have been a defense to the mortgage existing at the time of its assignment; for it was one which was brought into existence by the mortgagor at a time subsequent. *Non constat* that he would ever exercise his option to rescind under the collateral agreement and whether he would do so, would depend upon events, or considerations, subsequently occurring and influencing its exercise. The cases, to which the appellant refers us, are not parallel in their facts and I find none which is. Generally with reference to mortgages, they relate to defenses growing out of the original transaction and affecting their legal inception as liens, or as obligations of the mortgagor. I think the rule was intended, and should be held, to apply to those defenses, legal or equitable, which were available to the mortgagor at the time of the assignment of the

mortgage and that new equities arising, or defenses accruing, thereafter, are not within its application. The ordinary duty incumbent upon the purchaser of a bond and mortgage, for his protection, is to estop the mortgagor, by his formal declarations as to the amount being justly due and owing, from thereafter questioning his liability; but the bank could never, in reason, have anticipated a defense to an actual obligation, which was dependent for its existence upon the mortgagor's availing himself in the future of an option conferred by a secret agreement made between himself and the mortgagee. Had such an agreement appeared in the bond and mortgage, the assignee, of course, would have taken at its risk, if at all.

When this assignment was made the bond and mortgage were actual obligations, having a valid inception, and if the debtor chose not to give public notice of his private executory agreement, by recording, it was certainly incumbent upon him to inform the bank, if he proposed to avail himself of its provisions.

In my opinion, the plaintiff was entitled to enforce the appellant's liability upon his bond, to its full extent, for any deficiency arising upon a sale of the mortgaged premises; inasmuch as it is found that Thorne & Angell's indebtedness was in an amount in excess of the amount due upon the mortgage held as collateral to the indebtedness.

The judgment appealed from should be affirmed, with costs.

PARKER, CH. J., O'BRIEN, HAIGHT, LANDON and WERNER, JJ., concur; MARTIN, J., dissents.

DAVIS v. BECHSTEIN

COURT OF APPEALS OF NEW YORK, 1877

(69 N. Y. 440)

THIS was an appeal from a judgment of the General Term of the Court of Common Pleas for the city and county of New York, modifying the judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term, and as modified affirming the same.

This action was brought to have a bond and mortgage on lands belonging to plaintiff set aside and cancelled. The bond and mortgage were executed by plaintiff and her husband to Lawrence A. Riley, and delivered to him as an accommodation, to be used as

collateral security for the payment of a note, which he contemplated getting discounted, and under an agreement with him that he should not have it recorded. Riley failed to procure the discount and plaintiff repeatedly requested the return of the bond and mortgage; Riley promised to return the same from time to time, but failed to do so, had the mortgage recorded, and assigned the bond and mortgage for a valuable consideration to the defendant, Bechstein. Plaintiff's husband was not made a party to this action. It did not appear that he had any interest in the real estate covered by the mortgage. A judgment was entered in favor of the plaintiff, declaring the bond and mortgage in suit void, and directing that defendant Bechstein surrender and deliver up the same. The General Term modified this judgment so as to declare the bond and mortgage void only as against plaintiff, and that the register of the city and county of New York be required to enter upon the record of the mortgage that it was adjudged void as against plaintiff, striking out the provision in the judgment directing the mortgage to be surrendered up and cancelled.

CHURCH, Ch. J. Neither the decision in *McNeil v. The Tenth National Bank*, 46 N. Y. 325, nor in *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41, affect the question involved in this case. Those cases hold that the owner of a chose in action is estopped from asserting his title against a *bona fide* purchaser for value, who purchased upon the faith of an apparent absolute ownership by assignment, conferred by the owner upon the assignee and seller, but neither of them intimated an intention to interfere with the well settled principle, that a purchaser of a chose in action takes it subject to the equities between the original parties, and that the assignor can give no better title than he himself has. On the contrary, Grover, J., in the last case declared, in answer to the suggestion that these principles might be impaired by the decision, that "no one pretends but that the purchaser will take the former (non-negotiable choses in action) subject to all defences valid as to the original parties, nor that the mere possession is any more evidence of title in the possessor than is that of a horse." It is only where the owner, by his own affirmative act, has conferred the apparent title and absolute ownership upon another, upon the faith of which the chose in action has been purchased for value, that he is precluded from asserting his real title, and this conclusion was arrived at by the application of the doctrine of estoppel.

At the time Riley transferred the bond and mortgage to the

defendant Bechstein, as between him and the plaintiff, the mortgagor, he had no title or interest which he could transfer. The mortgage was executed and delivered to him as an accommodation, to be used as collateral security for the payment of a note of \$2,000, which he contemplated getting discounted at the New York National Exchange Bank, and under an agreement not to have it recorded. He failed to procure the discount, and the plaintiff repeatedly requested the return of the bond and mortgage, and Riley promised to return the same from time to time. It is very clear that the bond and mortgage in his hands were of no value, and that he could not have enforced them, and the defendant, when he purchased, occupied no better position. Riley could not sell any better title than he had, which was none, and the defendant could not acquire by the purchase from him any better title. The specific transaction in which the mortgage was to be used having failed, Riley's possession and right to the mortgage after that was no different than if it had been delivered to him without any agreement for its use at all. He was then the possessor of the bond and mortgage executed and delivered without consideration, and without authority to use it for any purpose. I have examined the evidence and am of the opinion that it is sufficient to sustain the findings of the Judge, and therefore the findings are conclusive. The husband was not made a party, and a mis-trial is claimed for this reason. He had no interest, as it appears, in the real estate, and the defect should have been taken by answer or demurrer. Otherwise it is deemed waived. (Code, § 148.)

The General Term modified the judgment, so as to preserve all the rights of the defendant against the husband, and he cannot in any event be injured.

The judgment must be affirmed.

All concur; RAPALLO, J., not voting.

*Judgment affirmed.*¹

¹ *Westfall v. Jones*, 23 Barb. (N. Y.) 9 (1856), and *Hill v. Hoole*, 116 N. Y. 299 (1889), accord. But see *First Nat. Bank of Corry v. Stiles*, 22 Hun. (N. Y.) 339 (1890), in which it was held that a mortgage in the usual form, given to raise money for the mortgagor, but improperly negotiated and assigned by the mortgagee for his own purposes, "by the very

form of the mortgage itself" created an estoppel against the mortgagor and those claiming under him. To the same effect, see *Commonwealth v. Councils of Pittsburgh*, 34 Pa. St. 496, 520 (1859); compare *Davis v. Burr*, 9 S. & R. (Pa.) 137 (1822); *McMasters v. Wilhelm*, 85 Pa. St. 218 (1877).

*Conf. Stat. 1911**73418*

NEW JERSEY GEN. STAT., 1896. MORTGAGES, § 31 (p. 2108).

[It is enacted] That all mortgages on land in this State, and all covenants and stipulations therein contained, shall be assignable at law by writing, whether sealed or not, and such assignments shall pass and convey the estate of such assignor in the mortgaged premises, and the assignee may sue thereon in his own name; but in such suit there shall be allowed all just off-sets and other defenses against the assignor that would have been allowed in any action brought by him and existing before notice of such assignment. . . .

§ 32. That the clerks of the several counties of this State be and they are hereby authorized to record in suitable books to be provided for that purpose any assignment of any mortgage upon lands within their respective counties . . . ; and such recording shall be notice, from the time such assignment is left for that purpose, to all persons concerned that said mortgage is so assigned. . . .

§ 34. That when any assignment hereafter made is not recorded, as in this act provided, any payments made to the assignor in good faith, and without actual notice of such assignment, and any release of said mortgaged premises or any part thereof, to a person not having actual notice of such assignment, shall be as valid as if said mortgage had not been assigned.

NEW YORK REAL PROP. LAW, § 324 (1 R. S. 763, § 41). The recording of an assignment of a mortgage is not in itself a notice of such assignment to a mortgagor, his heirs or personal representatives, so as to invalidate a payment made by either of them to the mortgagee.

CHAPTER V
DISCHARGE OF MORTGAGE
SECTION I.—TENDER AND PAYMENT

(a) *In General*

LIT. §§ 334, 335, 337, 338, 339, and CO. LIT. 209,
reprinted at pages 5-7, *supra*.

LIT. § 340. Also, upon such case of feoffment in mortgage, a question hath been demanded in what place the feoffor is bound to tender the money to the feoffee at the day appointed, &c. And some have said, upon the land so holden in mortgage, because the condition is depending upon the land. And they have said that if the feoffer be upon the land there ready to pay the money to the feoffee at the day set, and the feoffee be not then there, then the feoffor is quit and excused of the payment of the money, for that no default is in him. But it seemeth to some that the law is contrary, and that default is in him; for he is bound to seeke the feoffee if he be then in any other place within the realm of England. As if a man be bound in an obligation of 20 pound upon condition endorsed upon the same obligation, that if he pay to him to whom the obligation is made at such a day 10 pound, then the obligation of 20 pound shall lose his force, and be holden for nothing; in this case it behooveth him that made the obligation to seek him to whom the obligation is made if he be in England, and at the day set to tender unto him the said 10 pound, otherwise he shall forfeit the summe of 20 pound comprised within the obligation, &c. And so it seemeth in the other case, &c. And albeit that some have said that the condition is depending upon the land, yet this proves not that the making of the condition to bee performed, ought to bee made upon the land, &c., no more then if the condition were that the feoffer at such a day shall do some speciall corporall service to the feoffee, not naming the place where such corporall service shall be done. In his case the feoffer ought to do such corporall service at the day limited to the feoffee, in what place soever of England that the feoffee be, if he will have advantage of the con-

dition, &c. So it seemeth in the other case. And it seemes to them that it shall be more properly said that the estate of the land is depending upon the condition, then to say that the condition is depending upon the land, &c. *Sed quære, &c.*

Co. Lit. 210. "*Item, sur tiel case de feoffment en morgage, question ad este demande, &c.*" Here and in other places, that I may say, once for all, where Littleton maketh a doubt, and setteth down severall opinions and the reasons, he ever setteth down the better opinion and his owne last, and so he doth here. For at this day this doubt is settled, having beene oftentimes resolved, that seeing the money is a summe in grosse, and collaterall to the title of the land, that the feoffor must tender the money to the person of the feoffee according to the later opinion, and it is not sufficient for him to tender it upon the land; otherwise it is of a rent that issueth out of the land. But if the condition of a bond or feoffment be to deliver twenty quarters of wheat, or twenty load of timber, or such like, the obligor or feoffor is not bound to carry the same about and seeke the feoffee, but the obligor or feoffor before the day must goe to the feoffee, and know where he will appoint to receive it, and there it must bee delivered. And so note a diversitie betweene money and things ponderous, or of great weight. If the condition of a bond or feoffment be to make a feoffment, there it is sufficient for him to tender it upon the land, because the state must passe by liverye.

"*Deins le roialm d'Engleterre.*" For if he be out of the realme of England he is not bound to seeke him, or to goe out of the realme unto him. And for that the feoffee is the cause that the feoffor cannot tender the money, the feoffor shall enter into the land as if he had duly tendered it according to the condition.

LIT. § 342. And therefore it will be a good and sure thing for him that will make such feoffment in morgage, to appoint an especial place where the money shall be payd, and the more speciall that it be put, the better it is for the feoffor. As if A. infeoffe B. to have to him and to his heires, upon such condition that if A. pay to B. on the Feast of Saint Michael the Arch-Angell next comming, in the cathedrall church of St. Paul's in London, within foure houres next before the hour of noone of the same Feast, at the Rood loft of the Rood of the North doore within the same church, or at the tombe of Saint Erkenwald, or at the doore of such a chappell, or at such a pillar, within the same church, that then it shall be lawfull to the aforesaid A. and his heires to enter, &c., in this case he needeth not to seek the feoffee in an other place, nor to bee in

any other place, but in the place comprised in the indenture, nor to be there longer than the time specified in the same indenture, to tender or pay the money to the feoffee, &c.

§ 343. Also, in such case, where the place of payment is limited, the feoffee is not bound to receive the payment in any other place but in the same place so limited. But yet if he doe receive the payment in another place, this is good enough and as strong for the feoffor as if the receipt had beene in the same place so limited, &c.

§ 344. Also, in the case of feoffment in mortgage, if the feoffor payeth to the feoffee a horse, or a cup of silver, or a ring of gold, or any such other thing in ful satisfaction of the money, and the other receiveth it, this is good enough, and as strong as if hee had received the summe of money, though the horse or the other thing were not of the twentieth part of the value of the sum of money, because that the other hath accepted it in full satisfaction.

BURGAINE *v.* SPURLING, Cro. Car. 284 (King's Bench, 1633). *Ejectment.* All the Court agreed that whereas in the principal case the condition was for the payment of 1060*l.* upon the first of July, and the payment was made before the first of July, viz., upon *decimo sexto Junii*, and an acceptance thereof, it is a good performance of the condition.

TITLEY *v.* DAVIS, 2 Eq. Cas. Abr. 604 (Chancery, 1739). A. mortgages two estates, viz., Blackacre and Whiteacre, to B., and afterwards mortgages Blackacre to C. and after that Whiteacre to D. The question was, whether the Court can decree a redemption of B.'s mortgage, who was the original mortgagee, by proportionable contributions of C. and D., the two puisne mortgagees.

And LORD CHANCELLOR [HARDWICKE], after consideration, was of opinion that the Court could not decree such a redemption; that the original mortgagee ought not to be intangled with any questions that may arise among subsequent mortgagees; that he has a right to be redeemed intire and not by parcels; and his right undoubtedly stood so with regard to the mortgagor, and consequently with regard to the subsequent mortgagees; for the mortgagor could not hurt him by playing his right into another's hands, nor is there any precedent where such a redemption was ever allowed.¹

¹ *Street v. Beal*, 16 Ia. 68 (1861); and the authorities generally, accord. *Coffin v. Parker*, 127 N. Y. 117 (1891), cord.

BROWN v. COLE

HIGH COURT OF CHANCERY, 1845

(14 *Sim.* 427)

BILL to redeem a mortgage for a term of years made on the 1st of April, 1844.

The proviso for redemption stipulated that the mortgagee should re-assign the mortgaged premises on being repaid the money lent on the 1st of April, 1845, with interest in the meantime, by quarterly payments.

The mortgagor, having had an advantageous offer for the purchase of the premises shortly after the mortgage was made, tendered to the mortgagee the amount of the principal and of the interest up to the 1st of April, 1845, together with a re-assignment of the mortgaged premises; but the mortgagee would neither accept the money nor execute the deed; in consequence of which the bill was filed.

The defendant demurred to the bill for want of equity.

The VICE CHANCELLOR [SHADWELL] allowed the demurrer on the ground that it was contrary to the practice of the Court to decree the redemption of a mortgage before the day appointed for that purpose had arrived.¹

GIBSON v. CREHORE

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1827

(5 *Pick.* 146)

THIS was a bill in equity, in which the plaintiff, as widow of Abraham Gibson, claimed the right to be let into her dower in two parcels of real estate in Boston, in the occupancy of the defendant.

The bill alleges that on the 10th of July, 1816, A. Gibson died, leaving the plaintiff his widow; that he was then seised of the premises, subject to a mortgage to P. C. Brooks, dated November 18, 1814, to secure the payment of 15,000 dollars in two years with semiannual interest; that his estate was represented as insolvent, and that Brooks proved the debt before the commissioners of in-

¹ *Abbe v. Goodwin*, 7 Conn. 377, 384 (1829), *accord*.

solvency; that the assets of the estate were sufficient to pay 90 cents on the dollar; that on the 26th of November, 1817, the premises were sold by the administrators, subject to the mortgage, and were purchased by the defendant; that the defendant, as a condition of the sale, gave his bond to the administrators to pay, take up, and discharge the mortgage as his proper debt, and that he entered under his deed from the administrators, which contained a stipulation that he should discharge the mortgage; that he afterwards, on the 8th of January, 1818, procured from Brooks an assignment of the mortgage and diverted the assets, holding the mortgage as a subsisting incumbrance, instead of discharging it according to his obligation. The plaintiff further alleges that, as to her, the assignment is inoperative and the mortgage discharged, or if not, that the assignment ought to stand for so much only as would remain due on the mortgage after deducting what the assets, if properly applied, would have paid. She further states that the defendant pretends that her rights, if she ever had any, were foreclosed by an entry under the mortgage on the 13th of February, 1818, and subsequent possession, but she avers that no such right of entry then existed in the defendant, he having before that time conveyed the estate by deed of mortgage to one Parker, and the assignment being inoperative, and that, if any such right did then exist, there has been no foreclosure, because at the time of the supposed entry the defendant was, and for a long time before had been, in the actual occupancy of the premises, having entered under his deed from the administrators; that the supposed entry was made in the absence of the plaintiff and entirely without her knowledge; that the defendant had never given her any notice of it, and that she was wholly ignorant, until shortly before the filing of her bill, that the mortgage was treated as having any force whatsoever, and that as soon as it came to her knowledge that it was set up by the defendant as a subsisting incumbrance, she offered to redeem and requested the defendant to state an account.

The defendant, in his answer, alleges that the plaintiff joined in the execution of the mortgage and thereby released her right of dower, and he denies that she is entitled to dower. He denies that the assets in the hands of the administrators should have been applied to the payment of the mortgage debt, or that he was bound to see to the application of the assets. He admits that he entered into a bond to pay, take up, and discharge the debt secured by the mortgage, so far as to save the intestate's estate harmless from the same, but denies that he engaged to release or extinguish the

mortgage, and also denies that the administrators, in taking the bond, represented in any respect the plaintiff in her capacity of widow, or that the bond had any reference to her rights as widow. He alleges that about the 8th of January, 1818, for the sum of 16,540 dollars paid by him, he procured an assignment of the mortgage, and continued to hold it as a valid security for the original debt and interest, until it was foreclosed by virtue of an entry made by him on the 13th of February, 1818, in the presence of two witnesses, and a subsequent possession for three years; but that if the foreclosure cannot be sustained, the whole amount of the original debt, with interest computed semiannually, is still due to the defendant, after deducting such rents as he may have received beyond the amount of repairs. He alleges that at the time of his entry for foreclosure on the 13th of February, 1818, he had good right of entry for the purpose of foreclosing against all persons, except Parker, and that the mortgage to Parker, who never entered by virtue thereof, has been discharged.

The opinion of the Court was drawn up by

WILDE, J. That the widow of a mortgagor is entitled to redeem the mortgage is a necessary inference from the doctrine repeatedly laid down as the law of Massachusetts, that a widow is dowerable of an equity. It is a familiar principle in courts of equity, that every person interested in an estate mortgage is entitled to redeem; and this principle is confirmed, if it requires confirmation, by St. 1798, c. 77, by which it is enacted, "that the mortgagor or vendor, or other persons lawfully claiming under them, shall have right to redeem." If therefore a widow can lawfully claim under her husband, of which there can be no question, she has a right to redeem, by the express words of the statute.

The objection, therefore, to the plaintiff's right to redeem is clearly unfounded, unless it can be maintained that a legal assignment of dower is an essential requisite to complete her title. It is true that before such assignment she cannot enter on any part of the land, for it cannot be ascertained in what part her dower will be assigned; nor can she maintain a writ of entry, for her legal right is inchoate. But an assignment of dower is not necessary to enable her to maintain a suit in equity for the purpose of redeeming the mortgage, because the assignment of dower does not affect her equitable right of redemption, and because she has no right to demand such assignment as against the mortgagee before she redeems the mortgage. Nor is an assignment of dower by

the heirs necessary, because, as will be shown hereafter, she could not redeem a part or parcel of the mortgaged premises without redeeming the residue also, if required so to do by the mortgagee. The assignment of dower, therefore, is of no importance, and is not necessary to perfect her title to redeem the mortgage.

[The Court then proceeds to consider various objections to decreeing a redemption by the plaintiff, and holds, 1st, that the Court has plenary jurisdiction to make such a decree; 2d, that the assignment of the mortgage to the defendant, when he was possessed of the equity of redemption, did not operate as a merger and extinguishment of the mortgage; 3d, that the plaintiff is not entitled to have the mortgage discharged out of the personal estate of the intestate; 4th, that the plaintiff, not being a party to the bond of indemnity given to the administrators, cannot take advantage of it; 5th, that the entry and possession of the defendant are not sufficient in law to foreclose the mortgage; and proceeds as follows:—

Considering, then, that the plaintiff's right to redeem is not extinguished by the defendant's entry and possession under the mortgage, we are to decide upon what terms and to what extent she is now entitled to redeem.

As the defendant has purchased the equity, as well as the mortgage, it would seem equitable to allow the plaintiff to redeem a third part of the mortgaged premises, by paying her equitable portion of the mortgage debt, according to the value of her right of dower as compared with the residue of the estate. But this cannot be done without infringing the defendant's rights as assignee of the mortgage. He stands in the place of the mortgagee, and has an undoubted right to insist on his whole debt. Nor can he be compelled to be redeemed by parcels, for by thus dividing the estate the income or value of the whole may be reduced. The rule therefore is, when several are interested in an equity of redemption and one only is willing to redeem, he must pay the whole mortgage debt; and the others interested in the equity, who refuse to redeem, are not compellable to contribute; for it would be unreasonable to compel a party to redeem, when perhaps it might be for his benefit to suffer the mortgage to be foreclosed. The mortgagee, however, is not to be entangled with any question which may arise between the owners of the equity in relation to contribution, but has the right to insist on an entire redemption. If, therefore, several estates are mortgaged by one mortgage, and the mortgagor afterwards conveys the estates separately to different persons,

although each owner of the separate estates may redeem, yet it can only be allowed by payment of the whole mortgage debt. And the party so redeeming will be entitled to hold over the whole estate mortgaged until he shall be reimbursed what he has been thus compelled to pay beyond his due proportion. He is considered as assignee of the mortgage, and stands, after such redemption, in the place of the mortgagee in relation to the other owners of the equity. So if there be tenant for life and remainderman of an equity, either may redeem, but not without paying the whole mortgage. In like manner a dowress or jointress of lands mortgaged may redeem, she paying the mortgage debt, and may hold over, if the heir refuses to contribute, until she and her executor shall be repaid with interest. (*Palmer v. Danby*, Prec. Ch. 137; *Saville v. Saville*, 2 Atk. 463; *Banks v. Sutton*, 2 P. Wms. 716; *Ehys v. Thompson*, 9 Mod. 396; 15 Vin. 447; *Ex parte Carter*, Ambl. 733; *Powell on Mortg.* 392, 708, 709, *in notis.*)

If the defendant had redeemed the mortgage, the plaintiff would have been left in by contributing her portion of the mortgage debt, according to the value of her life estate in one-third part of the mortgaged premises, in conformity with the rule adopted in the case of *Swaine v. Perine*, 5 Johns. Ch. Rep. 482. But as the defendant, being assignee of the mortgage, insists on the payment of the whole mortgage debt, the plaintiff cannot redeem on any other terms. After redemption, she will hold as assignee of the mortgage, but will be bound to keep down one-third of the interest during her life, and may hold over for the residue of the mortgage debt. The defendant must be held to account for the rents and profits from the time of his entry under the mortgage; for although this entry cannot operate by way of foreclosure, for want of notice to the plaintiff, yet it is sufficient to charge him with the reception of the rents and profits.

The case must be referred to one of the masters in chancery to take an account accordingly, and redemption will be decreed upon payment of the debt which remains due on the mortgage after deducting the rents and profits.

GROVER v. FLYE

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1863

(5 *Allen*, 543)

WRIT OF ENTRY. The demandants claimed title under the levy of an execution by selling the equity of redemption of the premises.

At the trial in the Superior Court, before Lord, J., it appeared that at the time the levy was made the premises appeared on record to be subject to a mortgage to the Blackstone Loan and Fund Association, to secure certain sums of money, a portion of which was not then due; that full payment of said sums had been made and a discharge of the mortgage and release of the premises by the said association executed before the levy, but the discharge and release were not recorded until afterwards; and that neither the judgment creditor nor the officer had actual or constructive notice of such discharge until the record thereof. The judge ruled that it was immaterial, for the purposes of this action, whether the mortgage upon the premises had been discharged, unless the creditor or officer had actual or constructive notice thereof before the seizure of the land on the execution, and that a sale of the equity without such notice was regular and proper.

The jury returned a verdict for the demandants, and the tenant alleged exceptions.

BIGELOW, C. J. It is admitted that the sums due on the mortgage to the Loan Fund Association were paid before the sale of the right in equity to redeem was made by the officer; and that these payments were made at or before the times when the several instalments became due according to the stipulation set forth in the condition of the mortgage and the bond which accompanied it and formed part of the transaction. By such payment, on familiar principles, the condition was saved and the mortgagor, the tenant, was in of his old estate. No conveyance or discharge of the mortgage was necessary to revest the estate in the mortgagor, or to defeat the title of the mortgagee. (*Merrill v. Chase*, 3 *Allen*, 339, and cases cited. *Joslyn v. Wyman*, *ante*, 62.) The argument, therefore, of the demandants, founded on the necessity of recording a release or discharge of a mortgage in order to defeat a title acquired by a judgment creditor by a sale on execution of a right

in equity made after such release or discharge but without actual notice thereof, falls to the ground. The act of payment in the country *ante vel apud diem* saves the forfeiture of an estate held by a conveyance defeasible on a condition subsequent. No record of such an act is necessary to make the estate a fee simple estate in the grantor or mortgagor, as against all persons claiming by a subsequently acquired title. The release of the Loan Fund Association to the mortgagor was a useless and superfluous act, which added nothing to the strength of the title which he had acquired by a performance of the condition of the mortgage before a breach.

It follows that the title of the demandants under the sale of the right in equity to redeem the estate is invalid. The premises being unincumbered and held by the judgment debtor as an estate in fee at the time of the service of the execution, could be legally levied on only by an appraisement, and set off in the mode prescribed by law. (*Forster v. Mellen*, 10 Mass. 421; *Freeman v. M'Gaw*, 15 Pick. 82; *Perry v. Hayward*, 12 Cush. 344.)

*Exceptions sustained.*¹

(b) *After Default*

EMANUEL COLLEGE v. EWENS, 1 Ch. Rep. 18 (Chancery, 1625).² That the Earl of Huntington, seized in fee of the Manor of North-Cabury, with advowson appendant, and for payment of debts by way of mortgage, 25 Eliz., made a lease for 500 years of the said manor, with appurtenances, not mentioning the advowson by express name, with a clause of redemption, and for advancement of learning and religion, of his free disposition in 28 Eliz. by deed granted the said advowson to Sir Francis Hastings, and others, and their heirs, to the use of the said Earl for life, remainder to the Master, Fellows, &c., of the said college, and their successors forever; and shortly after in the same year paid his said debts. And this court conceived the said lease, being but a security, and that money paid, the said lease being void, as well against the said college as against any other; and though the money was not paid at the day, but afterwards, the said lease ought to be void in equity as well as on a legal payment, it had been void in law against them.

¹ Compare, *Watson v. Wyman*, 161 Mass. 96, per HOLMES, J.

² A portion only of the case as reported is here given.

MANNING v. BURGESS, 1 Ch. Cas. 29 (The Rolls, 1663). A mortgage was forfeited; the mortgagor afterwards meeting the mortgagee, said, "I have moneys; now I will come and redeem the mortgage." The mortgagee said to him he would hold the mortgaged premises as long as he could; and then when he could hold them no longer, let the devil take them if he would. And afterwards the mortgagor went to the mortgagee's house with money more than sufficient to redeem the mortgage, and tendered it there; but it did not appear that the mortgage was within, or that the tender was made to him; and it was decreed a redemption, and the defendant to have no interest from the time of the tender, because of his wilfulness.

LUTTON v. RODD, 2 Ch. Cas. 206 (Chancery, 1675). A deed in the nature of a mortgage and covenant to reconvey on payment: the money was tendered at the day and place, and refused: Decreed, the money without interest from the time of the tender, and to reconvey, though that the plaintiff ought to make oath that the money was kept and no profit made of it.¹

WILTSHIRE v. SMITH

HIGH COURT OF CHANCERY, 1744

(3 Atk. 89)

A BILL was brought to redeem a mortgage on the 8th of May, 1742, in which the plaintiff insists upon a redemption on paying the principal money only, for that the interest ought to end the 20th of February, 1741, because the plaintiff had given six months' notice to pay off the mortgage, and on that day tendered the principal and interest and a deed of assignment, but the defendant absolutely refused to take the money.

The defendant swears that he offered to take the money, provided he might have time to consider of it and to advise upon the deed of assignment, as there are covenants in it on his part, upon which, as he is not of the profession of the law himself, it is reasonable he should ask the opinion of some attorney, whether they were such as he might safely execute.

¹ Gyles v. Hall, 2 P. Wms. 378 (1864), and the authorities generally, (1726); Stow v. Russell, 36 Ill. 18 accord.

LORD CHANCELLOR [HARDWICKE]: There is not one case in twenty upon the fact of an absolute refusal after a tender that is ever made out, for they are generally attended with circumstances that explain the refusal, and are nothing more than causes cooked up by country attorneys to make themselves business. The plaintiff did not, as he ought to have done, send a draft of the assignment to the defendant any time before the money was tendered.

The plaintiff insists that the defendant absolutely refused to take his money or execute the deed of assignment. If this had been the fact, it would have been unconscionable and unreasonable in the defendant.

But the person who was to take an assignment of the mortgage swears that the defendant desired further time or to that effect. The question is, Who was in the wrong? The plaintiff certainly was. For where there are covenants on the part of the mortgagee, it is very reasonable that he should have some time to look them over; and the plaintiff's attorney ought to have left the deed for a week with the defendant, that he might have an opportunity to advise upon it, and the plaintiff's attorney should have appointed a time to pay the money after the defendant had been allowed a sufficient time to advise; or, as I said before, he should have sent a copy or the ingrossment of the assignment.

But the subsequent transaction and what passed before the filing of the bill explains it. Did ever a mortgagor, as is the case here, after he was put under this difficulty, lie by a year and quarter without bringing a bill to redeem? What could be the reason? Why, the plaintiff, the mortgagor's attorney, told him, You have made a tender of your mortgage money, and the defendant's refusal has forfeited his interest; for that you may keep the money, and by a bill compel the defendant to take the principal, without interest, from the time of the tender.

LORD HARDWICKE ordered that it be referred to a master to take an account of what was due to the defendant for principal, interest and costs on the mortgage, and on the plaintiff's paying to the defendant what the Master shall certify to be due within six months after he has made his report, it was decreed the defendant should assign the mortgaged premises, as the Master should direct; but in default of the plaintiff's paying as above directed, it was ordered the plaintiff's bill do stand dismissed.

MAYNARD *v.* HUNT

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1827

(5 Pick. 240)

WRIT OF ENTRY. The defendant declared upon his seisin in fee and in mortgage and a disseisin by the tenant.

The tenant pleaded: First, *nul disseisin*.

Secondly, that Nathaniel Maynard, the mortgagor, assigned the premises to the tenant, with warranty against all incumbrances, and that the tenant, after condition broken, but before action was brought, tendered \$400 for the discharge of the mortgage. The demandant took issue on the tender.

Thirdly, that in consideration that the tenant would forbear to make the tender, the demandant promised that the tenant should hold the land discharged of the mortgage, and that he (the demandant) would resort to Nathaniel Maynard for payment of the note, which was secured by the mortgage. Issue was taken on this plea.

Fourthly, a plea like the second, except that it alleged a tender of \$450. Issue was taken on the tender.

The cause was tried before Putnam, J., and a verdict was found for the tenant upon all the issues.

The demandant thereupon moved in arrest of judgment, because the three last issues were immaterial, and the first issue was found only for form's sake and as a consequence of the finding on the other issues.

He further moved that if any of these three issues should be adjudged immaterial the Court would grant a new trial, because no evidence had been introduced sufficient or proper to maintain either of them on the part of the tenant, and because all the evidence in the case, the three last pleas and the admission of the tenant's counsel show that the finding of the first issue for the tenant was a consequence of finding the other issues in his favor, and that, if that issue had stood alone, it would have been found for the demandant.

At the trial J. W. Hunt, the brother of the tenant, testified that, at the tenant's request, he called on the demandant and inquired how much was due upon the note. The demandant replied \$400. The witness asked him if he intended to call upon the tenant for the land, if Nathaniel Maynard (who was the defendant's son)

should be unable to pay the note. He answered in the affirmative. The witness said he would pay him \$400; that he came for the purpose of settling with him; that he had the money with him in bank bills, and that he would get the specie if it would make any difference. The demandant said it would not. He also said that if he took the money the tenant would immediately sue Nathaniel. The witness told him that he could expect nothing else. The demandant then said that he would not take the money; he would rather it should lie as it was on interest; he was secure; but he assured the witness that his brother should not be hurt.

The question whether this evidence was sufficient to warrant the finding of the jury was reserved for the determination of the whole court.

PARKER, C. J. It is very clear that all the issues except the first are immaterial, and that the first was found for the defendant against all the evidence in the case which could legally bear upon it. The mortgage deed produced by the demandant entitled him to a verdict on the first issue, there being no payment or tender of payment of the money due, according to the condition, until four years after the condition broken, so that the demandant's title at law was perfect, subject only to be defeated by a process in equity, founded upon payment or tender of payment after condition broken and before foreclosure.)

If judgment should be rendered on the verdict in favour of the tenant, the demandant would be entirely deprived of his security and probably of his debt, without any consideration or equivalent, for we cannot consider that the loose conversation testified to by the brother in regard to his claims has proved any intention to give up his security, or that it can have the effect of a release or discharge of the mortgage in law or in equity.

Whether a tender or any fact equivalent was proved is wholly unimportant, as the tenant's right at that time subsisted wholly in equity, and he could not otherwise enforce it than by a bill in equity. The tenant's counsel has reminded us since the argument that no objection was taken at the trial to the time of the supposed tender, and he refers us to the case of *Arms v. Ashley* (4 Pick. 71) to show that it could not afterwards be raised. But the cases are wholly different. In the case cited the point was that a fact capable of proof, but omitted to be proved or called for at the trial, was, on the hearing of the questions reserved, stated as a ground of objection to the verdict. In his case the point on which)

the cause turns appears on the record and in the proceedings, and, from the tenant's own showing, no other evidence touching it could have been produced had the question been made at the trial, for the tenant's right to tender it did not exist until long after the tender could have defeated the demandant's title at law. Admitting that payment tendered and received after condition broken and before foreclosure would be a sufficient defence to an action brought by the mortgagee for possession, it would not follow that a tender not accepted would be. The first might operate as a discharge of the debt and waiver of the breach of the condition, and it might be unreasonable to allow the mortgagee to recover possession, when, by another suit, he would be immediately obliged to surrender it. But the case of a tender is different. The debt is not discharged, and it is only in equity that the mortgagor can avail himself of it.

The proper course in this case is for the plaintiff to recover the conditional judgment, as in the case of mortgage, unless the tenant has a better defence than is shown by the report of the case

Verdict set aside and new trial granted.¹

KORTRIGHT v. CADY

COURT OF APPEALS OF NEW YORK, 1860

(21 N. Y. 343)

APPEAL from the Supreme Court. Action to foreclose a mortgage.

The defendant Cady was a subsequent grantee of the equity of redemption. He averred in his answer, and proved on the trial, that, after the money secured by the mortgage had become due and the stipulated day for payment had passed, he tendered to the plaintiff the amount due for principal and interest. The plaintiff refused to receive it unless Cady would also pay certain taxes upon the mortgaged premises, which the plaintiff had discharged. It was held that Cady was, for reasons unnecessary to be stated, under no obligation to pay the taxes, and the case stood upon the naked tender. Cady did not in his answer allege a readiness still to pay the mortgage debt, or that it was paid into court, nor did

¹ *Rowell v. Mitchell*, 68 Me. 21 (1876), accord. *Cf. Stewart v. Crosby*, 50 Me. 130 (1863).

he offer to bring it into court; and it did not appear, from the finding of facts or otherwise, that he in any way kept the tender good.

The plaintiff had the usual judgment of foreclosure, and for a sale of the mortgaged premises. Upon appeal by the defendant Cady, this judgment was affirmed at General Term in the First District; whereupon he appealed to this Court.

COMSTOCK, Ch. J.¹ After the suit was commenced to foreclose the mortgage, Cady, who had become the owner of the land, tendered the amount due, with the costs, which being refused, he set up the tender in his answer, in bar of the further maintenance of the action. The only question in the case is, whether a tender, made after a mortgage is due, by the owner of the lands mortgaged, discharges the lien.

Forty years ago this question was fully determined by the Supreme Court of this State, in the case of *Jackson v. Crafts*, 18 John. 110. Mr. Justice Woodworth, in delivering the opinion of the court, observed: "From the nature of the interest the mortgagee has, there is no necessity of a reconveyance by him to the mortgagor after the mortgage has been paid. When that is done, the mortgagee has no title remaining in him to convey, and consequently, by our laws, on payment of the money he is not deemed a trustee, holding the legal estate for the benefit of the mortgagor. The only question, then, is, whether tender and refusal are equivalent to payment." Having thus truly stated the relation between mortgagor and mortgagee, according to the law as it was then and has been ever since well settled in this State, he cited some of the early English authorities, holding that a tender of the money due discharged the land from the lien.

[After discussing the decision in *Merritt v. Lambert*, 7 Paige, 344, and stating that the Chancellor in that case was of the opinion that a mere tender unaccepted after the law day did not discharge the lien of the mortgage, the learned Chief Judge proceeded:]

In giving his views upon the last mentioned question, the Chancellor criticised the opinion of Judge Woodworth in *Jackson v. Crafts* (*supra*), for the reason that the English authorities which he referred to related to a tender on the day when the mortgage debt became due. (Bac. Abr., tit. Tender, F.; Co. Lit., 209 b, § 338; 20 Viner, tit. Tender, N., § 4.) On this criticism I shall make one or two observations. By the ancient common law, a

¹The order of the opinions has been changed, and portions have been omitted.

mortgage was a grant of land defeasible on the condition subsequent of paying the money at the exact time specified. (1 Powell on Mortgages, 4.) On failure to perform that condition the grant was absolute, and neither tender nor payment made afterwards could have the effect to revest the title. The specified time of payment was called the law day, because after default the legal rights of the mortgagor were gone. The estate became vested in the mortgagee absolutely, because the original grant was freed from the condition. "For these reasons," the Chancellor himself remarked, "it is, that the mortgagor, or his assigns, or subsequent incumbrancers upon the mortgaged premises, are driven to a bill to redeem, where the mortgagee refuses to receive what is equitably due to him. But this could not be necessary," he added, "if a mere tender of the amount due after the mortgage has become forfeited would have the legal effect of discharging the mortgaged premises from the lien of the mortgage." It is a self-evident proposition, which the Chancellor need not have undertaken to prove, that when the law was that even payment after the law day would not discharge the mortgage, a mere tender could not have such an effect. He was probably quite correct in saying that the English authorities cited by Judge Woodworth referred to tender at the day, because those authorities were of a date when even payment after the day did not divest the estate or interest of the mortgagee. But Judge Woodworth and the eminent men who sat with him on the bench of the Supreme Court considered, what the learned Chancellor seems to have failed to notice, the fundamental change which the law of mortgage had undergone long before the decision in *Jackson v. Crafts* was pronounced. In this State, a mortgage had always been regarded as a mere security or pledge for the debt; and the rule had always been that payment at any time discharged the lien, so that no reconveyance of the estate was necessary. It seems to me, therefore, that the authorities cited by the Supreme Court, on the effect of tender, were extremely pertinent to the question, because they showed very conclusively that a tender at the law day had the same effect on the mortgage as a payment on that day. Underlying this particular proposition, of course, was the more general doctrine that when a certain effect must be given to a payment, a tender will have a like effect. This was what the Supreme Court undoubtedly meant, and the authorities cited simply showed the application of the principle to the law of mortgage. The principle itself, or its application, was not questioned by the Chancellor; but he did not consider, so

far as appears, that the rule had become entirely settled, giving to a payment after the day and on the day precisely the same consequences. I think, therefore, with great respect for a jurist so learned and accurate, that he differed from the Supreme Court, and criticised its opinion, without due reflection upon the real ground of the decision.¹

Such being, as I think, the clear result of the authorities, a renewed discussion of the question may seem to be unnecessary. I cannot help saying, however, that a decision by this court in opposition to the rule laid down in the cases referred to would introduce into the law of mortgage an inconsistency too plain to escape observation. In the early history of that law the courts of equity, departing from the letter of the contract, but adhering to the intention of the parties, adopted the just and liberal doctrine that a mortgage was but a pledge or security, always redeemable until foreclosure. The courts of law followed in the same direction. As Lord Redesdale observed (Mitf. 428): "The distinction between law and equity is never in any country a permanent distinction. Law and equity are in continual progression, and the former is constantly gaining upon the latter. A great part of what is now strict law was formerly considered as equity, and the equitable decisions of this age will unavoidably be ranked under the strict law of the next." Such, preëminently, has been the course of jurisprudence on this subject. The doctrines originating in the courts of equity respecting the rights of mortgagor and mortgagee have been incorporated into the code of the common law, so that there is now no difference between the two systems. . . .

In this State, the rules of law and equity in regard to mortgages have never differed in any degree; it being the doctrine of both systems that a mortgage is but a personal interest merely. This proposition, in its full length and breadth, was determined in *Runyan v. Mersereau*, 11 Johns. 534, where the question arose in the most direct manner whether the freehold was in the mortgagor or mortgagee. The plaintiff, deriving title under the mortgagor, sued in trespass for cutting timber, the defendant justifying under a license from the mortgagee. It was held that the action was maintainable, the decision being placed explicitly on the ground that the former was the real owner of the land, while the latter had a chattel interest only. So it has been held in repeated decisions

¹ Here follows an examination of the cases of *Edwards v. Farmers' Fire Ins. & Loan Co.*, 21 Wend. 467, 26 Wend. 541; and *Arnot v. Post*, 6 Hill, 65, which is omitted.

that the mortgagee cannot, in any way, convey, devise, mortgage or incumber the land, while the mortgagor can do all these things; that judgments against a mortgagee, which are a lien on all legal estates, do not affect his interest in the lands mortgaged; that such an interest does not descend to heirs, but goes to the personal representative as a chose in action; that it is not subject to dower or curtesy; that it passes by a parol transfer, and by any transfer of the debt; and, finally, that it is extinguished by payment, or by whatever extinguishes the debt. (3 Johns. Cas. 329; 1 J. R. 590; 4 *id.* 42; 7 *id.* 278; 15 *id.* 319; 6 *id.* 290; 2 Paige, 68, 586; Wend. 603; 2 Barb. Ch. 119.)

But it has been said that the mortgagee could maintain ejectment against the mortgagor until our Revised Statutes abolished that remedy in such a case, and that even since those statutes the mortgagee, being in possession, may retain it until the debt is paid. All this is true; but it presents no anomaly or inconsistency in the law. The mortgagee's right to bring ejectment, or, being in possession, to defend himself against an ejectment by the mortgagor, is but a right to recover or to retain the possession of the pledge for the purpose of paying the debt. (6 Conn. 163.) Such a right is but the incident of the debt, and has no relation to a title or estate in the lands. Any contract for the possession of lands, however transient or limited, will carry the right to recover that possession; and such was deemed to be the nature and construction of a mortgage, it being considered that the parties intended the possession of the thing hypothecated should go with the contract. Ejectment was not, in fact, a real action at the common law. That remedy, in its origin, was only to recover possession according to some temporary right; and it was only by the use of fictions that the title was at length allowed to be brought into controversy. (3 Bl. 199, 200.) When the Legislature, by express enactment, denied this remedy to mortgagees, they undoubtedly supposed they had swept away the only remaining vestige of the ancient rule of the common law which regarded a mortgage as a conveyance of the freehold; yet I see nothing inconsistent or anomalous in allowing the possession, once acquired for the purpose of satisfying the mortgage debt, to be retained until that purpose is accomplished. When that purpose is attained, the possessory right instantly ceases, and the title is, as before, in the mortgagor, without a reconveyance. The notion that a mortgagee's possession, whether before or after default, enlarges his estate, or in any respect changes the simple relation of debtor

and creditor between him and his mortgagee, rests upon no foundation. We may call it a just and lawful possession, like the possession of any other pledge; but when its object is accomplished it is neither just nor lawful for an instant longer.

There are terms of the ancient law which have come down to us, having long survived the principles of which they were the appropriate expression. Thus the words "law day" once, and very expressively, marked the time when all legal rights were lost and gone, by the mortgagor's default. There is now no such time until foreclosure by a judicial sentence or sale under a power. But the term is still in use, serving no other purpose than to engender confusion and uncertainty in minds which derive their conceptions from words rather than things. So we have the terms "redemption" and "equity of redemption," which belonged to a system of law that gave the legal estate, defeasibly before default and absolutely afterwards, to the mortgagee, and which, while that system prevailed, were descriptive of the mortgagor's right to go into equity, on the condition of paying his debt, to redeem a forfeited estate and demand a reconveyance. These descriptive words yet survive and are in use, although the ideas they once represented have long since become obsolete. Even the word "forfeiture," still so often used, is no longer, in reference to this subject, the expression of any principle, as it once was. There is now no forfeiture of a mortgaged estate. The mortgagor's rights may be foreclosed by a sentence in the courts, or by a sale had in the manner prescribed by the statute law, if he has himself, in the contract, given authority thus to sell; but, until foreclosure, his estate the day after a default is exactly what it was the day before. Controversies like the present would cease to arise if the mere terms of the law were no longer confounded with its principles.

The proposition that a tender of the money due on a mortgage, made at any time before a foreclosure, discharges the lien, is the logical result of premises which are admitted to be true. These are, that the mortgagor has the same right after as before a default to pay his debt, and so clear his estate from the incumbrance; and that payment being actually made, the lien thereby becomes extinct. We have, then, only to apply an admitted principle in the law of tender, which is, that tender is equivalent to payment as to all things which are incidental and accessorial to the debt. The creditor, by refusing to accept, does not forfeit his right to the very thing tendered, but he does lose all collateral benefits or securities. (3 Johns. Cas. 243; 12 J. R. 274; 6 Wend. 22; 6 Cow. 728; *Coggs v.*

Bernard, 2 Lord Ray. R. 916.) Thus, after the tender of a money debt, followed by payment into court, interest and costs cannot be recovered. The instantaneous effect is to discharge any collateral lien, as a pledge of goods or the right of distress. It is not denied that the same principle applies to a mortgage, if the tender be made at the very time when the money is due. If the creditor refuses, he justly loses his security. It is impossible to hold otherwise, although the tender be made afterwards, unless we also say that the mortgage, which was before a mere security, becomes a freehold estate by reason of the default. That this is not true has been sufficiently shown.

It is said that mortgagees will be put to great inconvenience if at any period, however distant from the time of maturity, they must know the amount of the debt and accept a tender on peril of losing their security. The force of this argument is not perceived. As a tender must be unqualified by any conditions, there can never be any good reason for not accepting the sum offered, whether it be offered when it is due or afterwards. By accepting the tender, the creditor loses nothing and incurs no hazard. If the sum be insufficient, the security remains. It is only by refusing, that any inconvenience can possibly arise. But, whatever may be the consequences of refusal, the creditor may justly charge them to his own folly.

The judgment of the Supreme Court must be reversed, and a new trial granted.

DAVIES, J. [after a careful examination of the earlier authorities, proceeded as follows]: The rule in England was therefore ancient and well settled, that payment on the law day extinguished the interest of the mortgagee in the lands mortgaged; and tender and refusal at the same time produced the same result. But payment after, and acceptance, did not revert the estate in the mortgagor without a reconveyance from the mortgagee; and a tender and refusal would, of course, not produce that result. The mortgagor's only remedy was to avail himself of the benefit of the rule in equity, and file his bill to redeem. The only question presented for our consideration in this case is, whether a tender of the sum due on a mortgage, after the day appointed by it for its payment, extinguishes the lien of the mortgage on the land covered by it. We have seen that by the common law such tender and refusal upon the law day extinguishes the lien of the mortgage, though the debt remains. In this State the law is well settled that a mortgage is

a mere security or pledge of the land covered by it for the money borrowed or owing, and referred to in it, and that the mortgagor remains the owner of the estate mortgaged, and may maintain trespass as against even the mortgagee. (*Runyan v. Mersereau*, 11 John. 534.) The debt, in the eye of the law, thus becomes the principal, and the landed security merely appurtenant and secondary; and the rights of the parties must be governed by those principles of law applicable to analogous cases. Acceptance of payment of the amount due on a mortgage, at any time before foreclosure, has always been held to discharge the incumbrance on the land; as acceptance of the amount for which personal property was held discharged it from the pledge. Tender and refusal are equivalent to performance. (*Kemble v. Wallis*, 10 Wend. 374.) This is to be taken with the reservation already stated, that the debt or duty remained, and that the rejected tender, at or after the stipulated time of payment or performance, has the effect only to discharge the party thus making it from all the contingent, consequential or accessory responsibilities and incidents of his contract, but without releasing his prior debt. (*Coit v. Houston*, 3 John. Ca. 243.) In *Hunter v. Le Conte*, 6 Cow. 728, the Supreme Court held that a tender of rent takes away the right to distrain till a subsequent demand and refusal; but it does not take away the right to sue for the rent as for a debt. It only saves the interest and costs. And that a tender of rent makes a distress wrongful, though the tender be not made till after the rent day. It will readily be perceived that the principle of this case bears directly upon the question now under consideration; and it is not perceived, if it be sound, why a tender and refusal of the amount due on a mortgage does not extinguish its lien equally with a tender of rent and refusal, which, as we have seen, extinguishes the right of distress. But a still closer analogy to the present question is presented by the law of tender, as to the lien on goods pledged. Lord Ch. J. Holt, in his opinion in the celebrated case of *Coggs v. Bernard*, 2 Lord Ray. 909, speaking of the fourth class of bailments, says: "If the money for which the goods are pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them, because the pawnee, by detaining them after the tender of the money, is a wrongdoer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined." So also Comyn: "By tender of the money, the property in the goods is determined, and the pledge ought to be returned. But if the pawnee refuse to restore the pledge upon tender, trover lies against him." (Comyn's Dig., tit.

Mortg., A, and cases there cited.) Holding, as we do, therefore, in this State that the land mortgaged is but a security for the debt due to the mortgagee, in other words, a pledge to him to secure its payment, it is difficult to see why the principles enunciated and well settled in reference to the pledge of personal property do not apply, and why a tender and refusal at any time of the full amount of the debt due does not extinguish the lien of the mortgagee, or pledgee, in the one case as it clearly does in the other.

But I think we are not left at liberty to settle this case on principle, but are to regard it as authoritatively disposed of by the courts of this State. A very careful examination of the decisions has brought my mind to the conviction, contrary to my first impression, that we should regard the question now presented as not open to further discussion. I shall recur to the cases in which this question has arisen; and I think an examination of them will lead to the same conclusions to which I have arrived.¹ . . .

It is not perceived how the mortgagee is to be embarrassed, or his security impaired, by the adoption of this rule, as seems to be supposed by the Chancellor in *Edwards v. Farmers' Loan Company*, 26 Wend. 552. If the mortgagor does not tender the full amount due, the lien of the mortgage is not extinguished. The mortgagee runs no risk in accepting the tender. If it is the full amount due, his mortgage lien is extinguished and his debt is paid. This is all he has a right to demand or expect, and all he can in any contingency obtain. His acceptance of the money tendered, if inadequate and less than the amount actually due, only extinguishes the lien *pro tanto*, and the mortgage remains intact for the residue. A much greater hardship might be imposed, and serious injury be produced, by holding that the mortgagor cannot extinguish the lien of the mortgage by a tender of the full amount due. It has never occurred to any judge to argue that a pawnee was in great peril, and in danger of losing the benefit of his pawn, by the enforcement of the well settled rule that a tender of the amount of the loan and interest, and refusal, extinguished the lien on the pawn. Littleton well says, that it shall be accounted a man's own folly that he refused the money when a lawful tender of it was made to him. The only effect upon the rights of the mortgagee is, that the land or thing pledged is released from the lien, but the debt remaineth.

The only remaining question to be considered is, whether the tender in this case was well made, it not being followed with the

¹ The examination of the authorities is omitted.

allegation of *tout temps prist*, and the money not having been brought into court. It will be seen, by reference to the authorities, that these are not required when the tender has only the effect of extinguishing the lien, and does not operate to discharge the debt or sum owing. In the latter case the averment of *tout temps prist* followed up by bringing the money into court, is essential to a good plea of tender. (*Hume v. Peploe*, 8 East, 168; *Giles v. Hartis*, 1 Lord Ray. 254.) But if a man make a bond for the payment of a loan of money, and afterwards make a defeasance for the payment of a lesser sum at a day, if the obligor tender the lesser sum at the day, and the obligee refuse it, he shall never have any remedy by law to recover it, because it is no parcel of the sum contained in the obligation. And in this case, in pleading of the tender and refusal, the party shall not be driven to plead that he is yet ready to pay the same, or to render it in court. (Co. Lit., note to § 335.) The same principle was held by the Supreme Court of this State in *Hunter v. Le Conte*, 6 Cow. 728, and cases there cited.

The judgment appealed from should be reversed and a new trial ordered, with costs to abide the event.

SELDEN, CLERKE, WRIGHT, BACON, and DENIO, Js., concurred; the latter putting his concurrence on the ground that the question was so far determined by authority in this State, that it would now be indiscreet to reëxamine it in the light of reason and the analogies of the law.

WELLES, J. (Dissenting.) The only question involved in the case is, whether the tender made by the defendant Cady, under the circumstances, was effectual to extricate the premises in question from the lien created by the mortgage of Blunt to Miller. This tender was made after the day provided in the bond and mortgage for the payment of the money, which is called the law day. If the sum tendered was sufficient in amount, and was made to the proper person, the question is reduced to the single point whether the lien of a mortgage is, *ipso facto*, discharged by a tender of the amount due made after the law day; because, if it is, there is no necessity, in an answer setting it up, of the allegation of *tout temps prist*, or of any evidence to show that the tender has been kept good, neither of which is contained in the present case; but the defendant relies solely upon the fact of a tender and refusal as equivalent to payment, for the purpose of extinguishing the lien of the mortgage.

If a tender has the effect in any case to release the lien, it produces that effect the moment it is made, whether accepted or refused. If accepted, it is a payment; if refused, it is the folly of the holder of the mortgage, and the lien is gone and cannot be restored by his subsequent change of mind and offer to receive the money tendered. This must be so; otherwise, the tender would not discharge the lien. It is quite different from the case of an ordinary plea of tender at common law, for the purpose of stopping interest and preventing costs, in an action for money due on contract, in which the plea must contain the averment of *tout temps prist*, and where a replication of a subsequent demand, before suit, of the money tendered, and refusal by the defendant, would be a good answer to the plea.

In the case of a mortgage which is collateral to the debt, it is agreed that a tender may be made by the person owning the equity of redemption, which will extinguish the lien of the mortgage forever, without affecting the debt. The primary object of a foreclosure suit is to enforce the lien, and if that is met by a sufficient tender, the cause of action is gone and cannot be restored by a subsequent demand and refusal. It is important, therefore, to consider whether the tender in the present case, being made after the law day, if good in other respects, had the effect to discharge the lien of the mortgage.¹ . . .

My own opinion is, after a careful examination of the cases, that the weight of authority is in favor of the rule as it existed at the common law. If that rule has not been abrogated or modified, all will admit that it is the plain duty of the courts to follow and enforce it. Clearly there is no *stare decisis* in our way. It is of importance that the rule be definitely settled, and its boundaries defined. Before we hold a rule different from what we find it settled by the common law, we should require evidence that the rule has been changed by competent authority, either expressly or by necessary implication.

This evidence, the advocates of the change of the rule claim, is found in the changed character of a mortgage upon land, in consequence of various legislative enactments. We are told that when the rule of the common law in question was adopted, a mortgage conveyed a conditional estate in the premises, which entitled the mortgagee to possession, and upon which he could maintain ejectment; and that a mortgage does not now pass any estate in the land,

¹The learned judge then re-examines the New York authorities. This portion of the opinion is omitted.

but is merely the creation of a specific lien as security for the payment of a debt or the performance of a duty; and that the statute has taken away the right of the mortgagee to maintain ejectment. All this is true; and doubtless other shades of difference may be found between the legal effect of a mortgage at common law and as it now exists. But they will be found to relate to the remedy, or to consist in collateral or incidental circumstances. Mortgages are substantially what they always were. The fact that they are not now regarded as transferring the freehold, but are merely specific liens, is altogether theoretical and ideal, so far as respects the question under consideration. The great object of these instruments is the same now as it always was—that of security for the payment of money or the performance of a duty. A mortgagee in possession is now, as always heretofore, accountable for rents and profits, and he may still defend his possession with the mortgage the same as ever. I know of no difference between the right of the mortgagor, or the person owning the equity of redemption, to redeem the premises from the lien of the mortgage, as that right now exists, and as it existed in the time of Coke or Littleton. That right is governed now by substantially the same rules as then.

The rule contended for by the plaintiff is reasonable, convenient and just. In the first place, the parties to the mortgage have, by agreement, fixed upon the time of payment, and if the mortgagor fulfills his agreement by paying on the day appointed, or tendering payment on that day, the lien is discharged. The parties are then to be ready, the mortgagor to pay, and the mortgagee to receive. If the former performs his duty, or tenders performance, and the latter refuses, his lien is gone forever; he has no excuse for his folly, and is entitled to no consideration for the loss of his lien. On the law day each party is presumed to know exactly what his duty is, and the amount the mortgagor is bound to pay and the mortgagee entitled to receive.

If the mortgagor allows the law day to pass without payment or tender, he then is a defaulter. If he can discharge the lien by a tender of payment the next day, there is no reason why he may not do the same by a tender after the lapse of one year or of ten years.

Suppose the mortgagee goes into possession under the mortgage, by consent of the mortgagor, immediately upon default of payment, and the latter takes no steps towards payment for years after; what amount shall he tender when he gets ready for pay-

ment? what abatement from the principal and interest shall be made for mesne profits? Shall the defaulting mortgagor be permitted to select his own time, and then make a tender of such an amount as he shall deem proper, and the mortgagee be bound to accept it in full, at the peril of losing his lien forever?

Suppose again the case of a defaulting mortgagor, who claims to have made partial payments, or to be entitled to a set-off, about which he and the mortgagee in good faith differ: according to the rule claimed by the defendant, he must accept in full the amount tendered at the peril of losing his lien, provided, upon a litigation, it shall be adjudged that the tender was sufficient in amount. It seems to me that the old rule is the only just and wholesome one that can be recognized. It is quite as favorable to the mortgagor as he can in reason ask. If he makes a sufficient tender after the day and before an action is brought to foreclose the mortgage, let him keep the tender good, and, when he is sued, let him set it up as a defence, bring the money into court and offer payment as in other cases, and the court will in such a case decree the mortgage satisfied and discharged, and adjudge costs against the plaintiff. Or if for any reason the mortgagor, or the person whose duty or interest it may be to have the lien discharged, does not wish to wait the mortgagee's time for foreclosing, let him make his tender and keep it good, and then bring his action to redeem, alleging the tender and offering to pay; and if, upon the trial, it is found that his tender was sufficient and the plaintiff was ready to pay, the court would give him all the relief which equity and justice required. In all these cases the mortgagee would have the right to have the disputed questions adjudicated without losing his lien for the amount in equity and justice due to him.

The rule contended for by the defendant would, in many cases, operate as a bounty to negligent and defaulting debtors, and mortgagees would, under its workings, be induced to purchase their peace at an unjust sacrifice.

For the foregoing reasons, I am of the opinion that the rule of Littleton, as expounded by Coke, and as, all now admit, was the rule of the common law in relation to the effect of a tender after the law day, is still the law of this State; and as the tender in this case has not been kept good, and the defendant's answer contains no offer of payment, and the facts found by the court before whom the cause was tried do not show that the tender has in any sense been kept good, or that the defendant was ready to pay, &c., I

think that he can have no benefit by reason of it; and that the judgment should be affirmed, with costs.

*Judgment reversed.*¹

SHIELDS v. LOZEAR

COURT OF ERRORS AND APPEALS OF NEW JERSEY, 1869

(34 N. J. L. 496)

In ejectment. Error to the Supreme Court.

DEPUE, J. The bills of exception sealed at the trial raise two questions:

Second, whether a tender by the mortgagor of the money secured by a mortgage, which is not accepted by the mortgagee, made after the day of payment named in the condition, terminates the estate of the mortgagee in the mortgaged premises, and extinguishes the lien of the mortgage on the land.² . . .

The extinguishment of the lien of the mortgage by the unaccepted tender of the mortgage money after the day named in the

¹ *Caruthers v. Humphrey*, 12 Mich. 270 (1864); *Polls v. Plaisted*, 30 Mich. 149 (1874); *Story v. Krewson*, 55 Ind. 397 (1876); *Thomas v. Seattle Brewing Co.*, 48 Wash. 560, 94 Pac. 116 (1908) accord. So where mortgagee evades tender: *Ferguson v. Popp*, 42 Mich. 115 (1879); *McClellan v. Coffin*, 93 Ind. 456 (1883). And see *Breitenbach v. Turner*, 18 Wis. 140 (1864), and *Mankel v. Belscamper* 84 Wis. 218 (1893), *semble*, accord. But the authorities generally are *contra*: *Currier v. Gale*, 9 Allen (Mass.) 522 (1865); *Perre v. Castro*, 14 Cal. 519 (1860); *Crain v. McGoon*, 86 Ill. 431 (1877); *Matthews v. Lindsay*, 20 Fla. 962 (1884); *Knollenburg v. Nixon*, 171 Mo. 445, 72 S. W. 41 (1903).

In *Perre v. Castro*, *supra*, the Court said, "The debtor is as much in default for not paying when the debt is due as the creditor is in default for not receiving the money

afterwards when offered. It would be very harsh to hold that the debt is lost—the general effect of losing the security—by a mere refusal at a particular moment to receive it."

In the recent Washington case of *Easton v. Lillooy*, 158 Pac. 531 (1916), *held*, that "in order to discharge the lien, the proof must be clear that the refusal was palpably unreasonable, absolute, arbitrary and unaccompanied by any bona fide, though mistaken, claim of right." Cf. *Williams v. Ashe* (1896), 111 Cal. 180, 43 Pac. 595.

In *Maxwell v. Moore*, 95 Ala. 166, 10 So. 444 (1892), a lien jurisdiction *held* that a tender of payment of the mortgaged debt after maturity will not operate to discharge the mortgage lien unless the money tendered is placed in the custody of the Court.

² The opinion on the first point is omitted.

condition, was contended for by the plaintiff's counsel with much earnestness.

A mortgage, at common law, is a conveyance absolute in its form, granting an estate defeasible by the performance of a condition subsequent. The estate thus created was strictly an estate on condition, and in a court of law was treated as subject to be defeated only by the performance of the condition in the manner and at the time stipulated for in the defeasance. If made on condition that the conveyance should be void on payment of a definite sum of money on a given day, and the condition was performed according to its terms, the estate reverted back to the mortgagor without any re-conveyance, by the simple operation of the condition. A tender at the time and place and in the manner prescribed in the instrument itself was equivalent to performance, and operated to determine the estate of the mortgagee, and revest it in the mortgagor. (Lit. § 335; Co. Lit. 207, a.; 4 Kent, 193; Coote on Mortgages, 6; *Merritt v. Lambert*, 7 Paige, 344.) But when the condition was discharged by failure to comply with its terms, the estate of the mortgagee became absolute in law, and the title of the mortgagor was completely divested and gone, and a reconveyance was necessary to restore him to his original estate. (Lit. § 332; 2 Black. Com. 158; Coote on Mortgages, 9.) So inflexibly was this harsh rule of the law adhered to, that it was remarked by a learned writer that if the debtor had no greater mercy shown to him than a court of law will allow, the smallest want of punctuality in his payment would cause him forever to lose the estate he had pledged. (Williams on Real Prop. 333.) The rigor of this rule was somewhat abated by the statute of 7 George II., ch. 20 (1 Evans' Statutes, 243, re-enacted in this State December 3d, 1794, Nix. Dig., 4th ed., 608), which permitted a mortgage, when an action was brought on the bond or ejectment on the mortgage, pending the suit, to pay to the mortgagee the mortgage money, interest, and all costs expended in any suit at law or in equity; or in case of a refusal to accept the same, to bring such money into court where such action was pending, which moneys so paid or brought into court were declared to be a satisfaction and discharge of such mortgage; and the court was required, by rule of court, to compel the mortgagee to assign, surrender, or re-convey the mortgaged premises unto the mortgagor, or to such other person as he should for that purpose nominate and appoint. In cases strictly within the terms of this statute, the English courts of law have exercised an equitable jurisdiction

to enforce a redemption on payment of the mortgage debt after default in payment, according to the condition, by compelling a re-conveyance. Except in cases within this statute, the doctrine of the English courts is in accordance with the ancient common law, that at law a failure to pay at the day prescribed forfeits the estate of the mortgagor under the condition, leaving him only an equity of redemption, which chancery will lay hold of and give effect to, by compelling a re-conveyance on equitable terms.

In the United States, the prevailing doctrine in courts of law as well as in courts of equity, is to consider the mortgage as merely ancillary to the debt, and to hold that the estate of the mortgage is annihilated by the extinguishment of the debt secured by it, after the day of payment named in the condition. (2 Greenl. Cruise, 91, note 1; 4 Kent, 193.) In fact, the latter conclusion will necessarily follow whenever the mortgage is regarded not as a common-law conveyance on condition, but as a security for the debt, the legal estate being considered as subsisting only for that purpose. In this State this is the generally received aspect in which a mortgage is regarded, as a mere security for the debt. (Per Chief Justice Green, in *Osborne v. Tunis*, 1 Dutcher, 651; per Justice Southard, in *Montgomery v. Bruere*, 1 South. 279, whose dissenting opinion in the Supreme Court was adopted in the Court of Errors in reversing the judgment of the Supreme Court. 2 South. 865.) Consequently, payment after the day will convert the mortgagee into a trustee of the legal estate for the benefit of the mortgagor. In *Harrison v. Eldridge*, 2 Halst. 407, Chief Justice Kinsey, speaking of payment after the law-day, says: "When the debt is discharged according to law the mortgagee has the legal seisin in trust for the mortgagor, and the court will never permit the trustee or those claiming under him to set up this legal estate in him or them, to defeat the possession of the *cestui que trust*. This principle is settled in *Armstrong v. Pierce*, 3 Burr. 1898. The same doctrine being applicable to all trustees, the court would not permit a recovery upon a merely formal title, when the *cestui que trust* could have compelled a re-conveyance immediately, and thus have acquired the legal title." The seventh section of the act of June 7th, 1799 (Rev. Laws, 463; Nix. Dig., 4th ed., 611, sec. 11) which authorizes satisfaction to be entered on the registry of the mortgage, in discharge of the mortgage, gives a legislative sanction to this effect of payment in the case of a mortgage which has been recorded.

But a tender, though it is equivalent to performance where the

question is whether the party is in default, is not a satisfaction or extinguishment of a debt. Tender of the mortgage debt on the day named as performance of the condition, and by force of the terms of the condition, determines the estate of the mortgagee, and the condition being complied with, the land reverts to the mortgagor by the simple operation of the condition. The courts of the State of New York have given the same effect to a tender, without payment, after the day prescribed for payment. This doctrine was first asserted in *Jackson v. Crafts*, 18 J. R. 110, on a misapprehension of a passage from Littleton. (Lit. §§ 335, 338.) It was denied by the Chancellor in *Merritt v. Lambert*, 7 Paige, 344, and re-affirmed in the Supreme Court in *Edwards v. The Farmers' Fire Insurance and Loan Company*, 21 Wend. 467; and in the Court of Errors, in the same case on error, 26 Wend. 541; and by the Supreme Court in *Arnot v. Post*, 6 Hill, 65; and again denied by the Court of Errors in reversing the last-mentioned case. (*Post v. Arnot*, 2 Denio, 344.) Finally, in *Kortright v. Cady*, 21 N. Y. 343, the question was set at rest in the courts of that State by re-affirming the rule laid down in *Jackson v. Crafts*, and it seems now to be the settled law in that State that a tender of the money due upon a mortgage at any time before foreclosure discharges the lien without payment, though made after the law-day. I do not find that the rule, as finally established in the courts of New York, has been adopted by the courts of any other State. In Massachusetts, the decisions have been to the contrary. (*Maynard v. Hunt*, 5 Pick. 240; *Currier v. Gale*, 9 Allen, 522.) In an early case in New Hampshire (*Swett v. Horn*, 1 New Hamp. 332), the court held, under a statute declaring that all real estate pledged by mortgage might be redeemed by paying all costs, &c., provided such payment or performance or tender thereof be made within one year after the entry of the mortgagee for condition broken, that tender more than a year after breach of condition, where no entry had been made by the mortgagee, discharged the lands. In a subsequent case the same court qualified the ruling of this case by denying this effect of the tender unless the money was brought into court. (*Bailey v. Metcalf*, 6 New Hamp. 156.) It may with safety be said that the doctrine of the New York courts, originating in error, and maintained against the opinion of some of the most eminent jurists that have occupied the bench of that State, is without the support of any judicial tribunal in this country, and it is impossible to perceive upon what principle of law or equity it can be rested. As already observed, tender on the day named deter-

minates the estate of the mortgagee, because it is performance of the condition. Regarding the mortgage as remaining after default only as a security for the debt, payment thereafter, by a necessary sequence, operates as extinguishment; the debt being the principal and the security the accessory. Whatever discharges the debt extinguishes the security. No reason, founded in principle, can be assigned for giving that effect to a tender after forfeiture. The appropriate office of a tender is to relieve the debtor from subsequently accruing interest, and the costs of enforcing, by a suit, the obligation which by the tender of payment he was willing to perform. The debt still remains. In the case of a common money-bond, before the statute 4 Anne, ch. 16, § 12, re-enacted in this State (Nix. Dig. 631, § 9), payment after the day would not be pleaded without an acquittance by deed. (2 Saund. 48, c, note 1; *Rosencrantz v. Durling*, 5 Dutcher, 191.) The statute only applies to payments actually made, and a tender after the day cannot be pleaded. (2 Saund. 48, b, note i.) And if the tender is made on the day, it can only be made available by plea, accompanied by payment into court. (Co. Lit. 207, a.)

Where, as in this case, the mortgage is accompanied by a bond, to hold that a tender, after default, extinguished the mortgage, for the reason that after such default it remains only a security for the debt, will lead to the incongruity of giving to the tender an effect with respect to the security, which by the rules of pleading and established principles of law the court must deny in an action on the bond, which is the immediate evidence of the debt. If the form of the instrument which evidences the debt is overlooked, and the question is viewed in the aspect in which the indebtedness immediately arose, the tender does not pay or discharge the debt; and though it will avail to arrest the accruing of interest and to free the debtor from costs, it will be deprived of that efficacy by a subsequent demand and refusal. If legal analogy is to be pursued, it could lead no further than to deprive the mortgage of operation beyond the amount due when the tender was made, leaving the question of subsequently accruing interest and costs to be varied by the subsequent demand and refusal.

The instances in which a tender and refusal amount to payment, and will operate as an extinguishment, are those in which the obligation is in the nature of a gratuity, without any precedent debt or duty, and the discharge is an accidental and not a necessary consequence of the tender and refusal, there being no debt or duty remaining whereon to ground an action. (6 Bac. Abr. 456,

title Tender, &c., F.) If there is a precedent debt, as a loan of money, which the debtor secures by a mortgage on his land, conditioned for payment, though by a tender made on the day the land is freed and the feoffer may enter according to the condition, the debt is not thereby discharged, and may be recovered by action of debt. (Co. Lit. 209, a.) The effect of a tender on the day in terminating the estate of the mortgagee cannot be denied, because it is a legal incident of his estate. Another legal incident of that estate is the extinguishment and discharge of the condition by a failure to comply with its terms. Upon this courts of equity raised an equitable estate in the mortgagor, called an equity of redemption, which consisted in his right to have the estate of the mortgagee continued as a security for the debt, notwithstanding the default. In equity, a tender will stop the accruing of interest, and will, in some cases, cast upon the mortgagee the costs of a suit for redemption. But until the mortgagee is actually paid off by his own consent, or by the decree of the court, he retains the character of the mortgagee, with all the rights incident to it. (*Grurgeon v. Gerrard*, 4 Younge & Coll., Exch., 119-128.)

a When a court of law undertakes to deal with this equitable estate it must do so upon principles of equity, and keep in view the relief which would be afforded in equity, and protect the rights of the parties accordingly. The recognition of this equitable estate has been obtained in courts of law by the fiction of regarding the mortgagee, after his debt is satisfied, as a trustee of the legal estate for the mortgagor. Until the debt is paid, the legal seisin of the mortgagee is not a mere formal title, and no trust will be raised for the benefit of the mortgagor until the purpose for which the mortgage was made is answered.

It was stated on the argument that the money due on the mortgage was brought into court at the trial. That fact does not appear in the bills of exceptions. It is not necessary, therefore, to decide whether a court of law could enforce redemption in cases within the equity, though not within the strict letter of the statute. The English courts of law have given a strict construction to the corresponding statute of 7 George II., ch. 20, and have held the circumstances of the litigation mentioned in the preamble and in the statute to be jurisdictional facts, which the court is not at liberty to disregard. (*Doe v. Clifton*, 4 Ad. & El. 809; *Good-title v. No-title*, 11 Moore, 491; *Sutton v. Rawlings*, 3 Exch. 407.) The statute should be strictly construed, and is not applicable to any case in which the mortgagor is himself the actor. It was designed

to apply only in certain cases mentioned in its preamble and in the introductory words of the statute, and was not intended to supplant bills for redemption. The subject is one that falls peculiarly within the jurisdiction of courts of equity. The remedy there is complete by bill for a redemption, and relief may be speedily obtained by the exercise of the undoubted power of the court, by the writ of assistance to carry into effect its decree, by putting the mortgagor in possession, where the mortgagee has obtained possession under the mortgage. (*Yates v. Humbly*, 2 Atk. 363; *Green v. Green*, 2 Simons, 399, 406; Bacon's Ordinances in Chancery, 9; *Valentine v. Teller*, Hopk. C. R. 422; *Devancene v. Devancene*, 1 Edw. C. R. 272; *Kershaw v. Thompson*, 4 Johns. C. R. 609; *Schenck v. Conover*, 2 Beas. 221; *Fackler v. Worth*, *Ib.*, 395; *Thomas v. De Baum*, 1 McCarter, 37; 2 Dan. Chan. Prac. 1280.)

It is not, therefore, essential to the administration of justice that courts of law should, in the absence of the imperative requirements of a statute, entertain a jurisdiction that pertains to courts of equity, in the exercise of which equities may arise that a court of law may be incompetent to deal with.

There is no error in the rulings of the court below, and the judgment should be affirmed.

TUTHILL v. MORRIS

COURT OF APPEALS OF NEW YORK, 1880

(81 N. Y. 94)

APPEAL from judgment of the General Term of the Supreme Court, in the Second Judicial Department, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury.

This action was brought to restrain the defendant from selling certain premises in statutory proceedings to foreclose two mortgages thereon and to have the same adjudged to be extinguished and to require defendant to cancel the same of record, on the ground that the amount of the mortgages was duly tendered and refused.

The mortgages were executed by plaintiff. The mortgagees commenced proceedings to foreclose the same by advertisement under the statute. Pending the proceedings they assigned the mortgages to defendant. Defendant requested one Steers, an

attorney, to attend the sale for him. The circumstances and the nature of the employment, together with the occurrences out of which the alleged cause of action accrued, are set forth in the opinion.

RAPALLO, J. The uncontroverted evidence shows that Mr. Steers, to whom the tender relied upon by the plaintiff was made, was not the attorney in the foreclosure proceedings nor connected with such attorney, nor the agent of Mr. Morris, except for the specific purpose for which he was employed; that his first and only connection with Mr. Morris of the foreclosure was that he was requested, on behalf of Mr. Morris, to go to the place of sale and engage an auctioneer, and to attend the sale and see that it was properly conducted. It may also be inferred from the testimony that he was instructed that the sale should be for cash. It is conceded by the respondent's points that Mr. Steers had no express authority to receive a tender and that none was thought of. Mr. Steers did not know nor was he informed of the amount due for principal, interest, or costs, beyond such information as was afforded by the notice of sale, nor does it appear that he had any means of ascertaining the amount of the costs. He was not empowered to receive the purchase money, for this would be payable only on the execution of the deed by the mortgagee. When he arrived at the place appointed for the sale he was presented with a summons, complaint and order of injunction in an action by the plaintiff against Mr. Morris, but declined to receive or admit service thereof on behalf of Mr. Morris, on the ground that he was not his attorney. The injunction order was then read to him. It ordered that the sale be upon the terms, among others, that not more than 10 per cent. of the amount bid be paid down. He stated, as testified to by the plaintiff's attorney, that he was instructed to sell for cash, and said that if he could not do that he should adjourn the sale, and accordingly instructed the auctioneer to adjourn the sale for thirty days. After he had announced his intention to adjourn the sale, but before he had instructed the auctioneer, and as he was about doing so, the alleged tender was made by Mr. Tuthill, one of the plaintiff's attorneys, in the following manner, as testified to by Mr. Tuthill: Mr. Tuthill testifies that he tendered to Mr. Steers a quantity of greenbacks, amounting, in fact, to \$6,300, and said to Mr. Steers that he tendered the money in behalf of the plaintiff for the whole amount due. That he did not state how much money there was, but tendered it, and

said to Mr. Steers: "I want to pay the whole amount if you will let me know how much it is," and Steers replied that he did not know. Witness then said: "Will you take this money?" and he said he would not, and asked what witness wanted to pay for, and witness said that he wanted to pay for the notes, interest and costs. Immediately after this conversation, the auctioneer, under the instruction of Mr. Steers, announced the adjournment of the sale for thirty days.

Mr. Steers testified that in declining to receive the money he stated that he was not authorized and that the sale was adjourned.

We perceive nothing in the course pursued by Mr. Steers indicating any purpose to oppress or take any undue advantage of the plaintiff. By the adjournment of the sale the plaintiff was relieved of all immediate pressure, and ample time was afforded, if he in good faith desired to pay off the mortgages, to seek the proper party and have the amount of interest and costs ascertained. It is apparent that the tender made was a complete surprise, and that even if Mr. Steers had authority to receive payment of the mortgages he was not in a situation to do so at that time or place. It is by no means clear that a person, not the attorney in the proceeding, but merely casually employed to superintend a mortgage sale and see that it is properly conducted, is by such employment authorized to receive the principal of the mortgage; but, irrespective of that point, when he announces that he is ignorant of the amount due for principal, interest and costs, and it is evident that he has not the means of information at hand as to the exact amount, it would be in the highest degree unreasonable to hold that a person thus situated is bound to take the responsibility of accepting or refusing a tender, and that his refusal discharges the lien of the mortgage. Insisting upon the immediate acceptance of a tender under such circumstances, and when the sale is about to be adjourned, indicates rather a design on the part of the mortgagor to take an unfair advantage of the mortgagee than to relieve himself from oppression.

Furthermore, there is no evidence in the case showing that the sum tendered was the full amount of principal, interest and costs. The sum tendered is said to have been \$6,300. The amount of principal and interest, according to the notice of sale, was \$6,150 and upwards. What was the amount of the costs in no manner appears in the case. To this point it is answered that Mr. Steers did not object that the amount tendered was insufficient, and that the plaintiff was ready to pay whatever amount was due. But

Mr. Steers did state that he was ignorant of the amount, and he did not occupy such a relation to the case that it could be presumed that he knew or that it was his duty to know the precise amount.

Neither does it appear that any specific amount was tendered. The plaintiff's witness, Mr. Tuthill, exhibited a quantity of bills, but he admits that he did not name the amount, though he asked Mr. Steers to count them, and, taking the whole evidence, it is not clear that Mr. Tuthill offered to pay the whole amount he had in his hand, if it exceeded the amount due. When asked what he wanted to pay, he replied, "the notes, interest and costs." He had previously said that he wanted to pay the whole amount if Mr. Steers would let him know how much it was, and Steers had told him he did not know. The fair construction of this testimony is that he desired to pay the amount due only, and before paying desired to be informed of the amount, but that the person to whom he applied had not the means of giving the information.

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We are of opinion that the plaintiff failed to make out a tender to the defendant and a refusal which discharged the lien of the mortgage. In view of the serious consequences resulting from the refusal of such a tender, the proof should be very clear that it was fairly made and deliberately and intentionally refused by the mortgagee, or some one duly authorized by him, and that sufficient opportunity was afforded to ascertain the amount due. At all events, it should appear that a sum was absolutely and unconditionally tendered sufficient to cover the whole amount due. The burden of that proof is on the party alleging the tender.

But even if a sufficient tender had been made out, this action could not, in our judgment, be maintained. Although the authorities cited sustain the proposition that when a tender has been duly made of the full amount due it will discharge the lien and be a good defense against its enforcement, without the tender being kept good, yet we are clearly of opinion that it should be kept good in order to entitle the mortgagor to the affirmative relief which he seeks in this action and which the judgment awards him, viz., the extinguishment of the mortgage. A party coming into equity for affirmative relief must himself do equity, and this would require that he pay the debt secured by the mortgage, and the costs and interest at least up to the time of the tender. There can be no pretense of any equity in depriving the creditor of his security for his entire debt by way of penalty for having declined to receive payment when offered. The most that could be equitably claimed would be to relieve the debtor from the payment of interest and

costs subsequently accruing, and to entitle him to this relief he should have kept his tender good from the time it was made. If any further advantage is gained by a tender of the mortgage debt it must rest on strict legal rather than on equitable principles. The circumstance that a security has become or is invalid in law, and could not be enforced even in equity, does not entitle a party to come into a court of equity and have it decreed to be surrendered or extinguished without paying the amount equitably owing thereon. Even securities void for usury would not be cancelled by a court of equity, without payment of the debt with legal interest, until, by statute, it was otherwise provided. This statute does not change the general principle of equity, but on the contrary recognizes it, by excepting cases of usury from its operation. On this ground, even if the alleged tender could be sustained, the plaintiff was not entitled to a decree for the unconditional extinguishment of the mortgage.

We are of opinion, however, as already stated, that no sufficient tender was shown, and that on both grounds the judgment should be reversed and a new trial ordered, costs to abide the event.

All concur.

*Judgment reversed.*¹

¹ *Werner v. Tuch*, 127 N. Y. 217 (1891); *Nelson v. Loder*, 132 N. Y. 288 (1892); *Cowles v. Marble*, 37 Mich. 158 (1877), *accord*. *Moymahon*

v. Moore, 9 Mich. 9 (1860); *McClellan v. Coffin*, 93 Ind. 456 (1883), *contra*.

CHAPTER V (*continued*)

SECTION II.—OTHER DISCHARGE OF DEBT

DAVIS *v.* BATTINE

HIGH COURT OF CHANCERY, 1830

(2 *Russ. & Myl.* 76)

A CREDITOR who had a mortgage security for his debt had sued the debtor, and taken him in execution. The debtor afterwards took the benefit of the Insolvent Act.

On an exception to the Master's report, the question was raised whether the debt was not satisfied by the body of the debtor having been taken in execution, so as to extinguish the lien of the creditor on the land.

(The Master of the Rolls [SIR JOHN LEACH] said he did not remember to have heard it ever suggested that a mortgagee, by proceeding to execution against the body of the debtor, released his interest in the land; and he overruled the exception.

BUTLER *v.* MILLER

COURT OF APPEALS OF NEW YORK, 1848

(1 *N. Y.* 496)

THIS was an action of trover brought in the Supreme Court by Butler and Vosburgh against Miller for a number of horses, cattle and hogs, and a quantity of farming utensils, and other property. The cause was first tried before Cushman, late Circuit Judge, at the Columbia Circuit, in September, 1843, when a verdict was had for the plaintiffs, which was set aside by the Supreme Court and a new trial ordered. (See 1 Denio, 407.) A second trial was had before Parker, Circuit Judge, in March, 1846, and on that trial the case was as follows:—

The plaintiffs gave in evidence a chattel mortgage upon the property in question, executed to them by one Abraham B. Van-

derpoel, dated April 19, 1842, which had been duly filed in the proper town clerk's office. The instrument recited that Vanderpoel was indebted to the plaintiffs in the sum of \$498.72, being the amount of three promissory notes made by Vanderpoel, and held by the plaintiffs, and the mortgage was to become void if Vanderpoel should pay the debt by the first day of October then next. Evidence was given tending to show a just consideration for the notes. At the time the mortgage was given the property was on the farm of the mortgagor, and was used by one Mosher, who worked the farm on shares, under an agreement by which Vanderpoel was to furnish teams, stock and utensils. After the mortgage was given the property remained on the farm, and was used as before. On the 15th day of July, 1842, the defendant, as sheriff of the county of Columbia, sold the property in question by virtue of an execution against Vanderpoel, in favor of the Lafayette Bank, which was delivered to the sheriff on the 5th of May, 1842. The evidence tended to show that the plaintiffs asserted their claim under the mortgage at the sale, and forbid the sale.

It also appeared that on the 7th of May, 1842, the plaintiffs took from Vanderpoel a bond and warrant of attorney for the amount of the notes secured by the mortgage, upon which judgment was entered in the Supreme Court on the same day, and execution thereon was, by Vanderpoel's consent, issued immediately to one of the deputies of the sheriff aforesaid. It was also proved, after objection duly made and exception by the defendant's counsel, that it was agreed between the plaintiffs and Vanderpoel that the judgment should be taken as collateral to the mortgage. The plaintiffs' execution, soon after it was issued, was levied upon the property in question, and the property was advertised for sale both under that execution and the one above mentioned in favor of the Lafayette Bank.

It also appeared that after the sheriff's sale above mentioned the plaintiffs made a motion in the Supreme Court for an order requiring the defendant, as such sheriff, to apply the proceeds of the sale on the judgment and execution in their favor. This motion was based upon an allegation that the execution of the Lafayette Bank, when first delivered to the sheriff, was directed to the sheriff of the county of Hudson (there being in fact no such county), and that the error was corrected and the execution re-delivered to the sheriff after the execution of the plaintiffs was issued. The motion was denied with costs.

The defendant's counsel requested the Circuit Judge to decide and charge the jury: 1. That the mortgage under which the plaintiffs claimed was fraudulent and void as against the judgment and execution of the Lafayette Bank. 2. That the judgment taken by the plaintiffs on the 7th of May, 1842, for the same notes secured by the mortgage, merged the notes and extinguished the lien of the mortgage. 3. That the issuing of execution upon that judgment, the levy upon the mortgaged property, and the motion to the Supreme Court to have the proceeds of the sheriff's sale applied upon that execution, were severally acts inconsistent with any claim under the mortgage, and destroyed all right to assert any such claim.

The Circuit Judge ruled that the question of fraud was one of fact for the jury to decide. That the judgment was not a merger or extinguishment of the mortgage, if it was taken as collateral merely; if not so taken, then that it was a merger. Upon the 3d proposition he refused to charge as requested. The defendant excepted, and the jury gave their verdict for the plaintiffs. The defendant moved in the Supreme Court for a new trial on bill of exceptions, which was granted by that court. The plaintiffs appealed to this court under the judiciary act of December, 1847.

JOHNSON, J. The question of the *bonâ fides* of the mortgage was properly submitted to the jury, and their verdict in favor of the honesty and fairness of the transaction is conclusive according to all the cases since *Smith v. Acker*, 23 Wend. 653.

The Circuit Judge was requested to charge the jury that the subsequent judgment on the notes operated as a merger of the notes and consequently avoided the mortgage. The Judge, however, charged that the judgment did operate as a merger of the notes and mortgage unless it was satisfactorily shown that the judgment was taken as collateral to the mortgage, in which case it was not a merger.

The charge upon this point was in strict accordance with the rule laid down by the Supreme Court (1 Denio, 407) when this cause was before it on a former trial, and must be regarded as correct unless that court was then in error as to the true rule upon the subject.¹

¹ "If then the judgment was intended as a collateral security to the notes and mortgage before executed, it would be clear that the notes and

mortgage were not merged in or extinguished by the judgment, but remained a valid conveyance under which the plaintiffs could make title

It may, perhaps, well be doubted whether the judgment was a security of a higher nature than the personal mortgage; and, even if it were, whether it would operate to extinguish the mortgage and divest the mortgagees of the title they had acquired under it. It will scarcely be contended that in case the notes in question had been secured by a mortgage upon real estate, a judgment upon them would have extinguished such mortgage. And yet a mortgage upon real estate is a mere security and incumbrance upon the land and gives the mortgagee no title or estate therein whatever. Whereas a personal mortgage is more than a mere security. It is a sale of the thing mortgaged, and operates as a transfer of the whole legal title to the mortgagee, subject only to be defeated by the full performance of the condition. And if it be conceded that a judgment upon the original indebtedness would not extinguish a collateral security for its payment upon real estate, I do not see how it could divest a title to personal property acquired by purchase. A vested legal title, whether in real or personal property, is the highest of all securities—certainly higher than the mere lien of a judgment upon land, or the right of a plaintiff to personal property acquired by levy under an execution.

Although it is clear that the notes were merged in the judgment by operation of law, it does not, as I think, certainly follow that all the collateral securities would be extinguished. The debt is not yet satisfied. The notes may have been cancelled, but the debt was not, and until that is done it seems to me that all mere collateral securities, whether upon real or personal property, should be allowed to stand, especially titles to property acquired under instruments where the parties stand in the relation of vendor and purchaser without fraud. The rule that security of a higher nature extinguishes inferior securities will be found, I apprehend, only to apply to the state or condition of the debt itself, and means no more than this—that when an account is settled by a note, a note changed to a bond, or a judgment taken upon either, the debt as to its original or inferior condition is extinguished or swallowed up in the higher security; and that all the memorandums or securities by which such inferior condition was evidenced lose

to the property mortgaged and sustain their action. [But] the judgment, which is a higher security than the notes and mortgage, or either of them, was between the same parties. It was, so far as the plaintiffs, the mortgagees, are concerned, for

the same debt, and this appears on the face of the securities. Does not the law presume that the judgment was taken in satisfaction of the original debt? I am of opinion that it does."—*Per* JEWETT, J., in opinion in the Supreme Court (pp. 412, 413).

their vitality. It has never been applied, and I think never should be, to the extinguishment of distinct collateral securities, whether superior or inferior in degree. These are to be cancelled by satisfaction of the debt or voluntary surrender alone. This most obvious and rational distinction seems to have been overlooked by the Supreme Court in the opinion to which I have referred.

It is unnecessary, however, to decide the question here discussed, as it was put to the jury substantially to find whether it was agreed or intended by the parties in entering up the judgment to cancel the mortgage; and I admit that if such had been the agreement and intention, there was sufficient consideration to support it, and that the mortgage must have yielded to the superior force of the agreement, whether express or implied.

The jury have determined by their verdict that the parties to the mortgage did not intend to cancel it, and that notwithstanding the judgment it remained a valid subsisting security.

Thus far, then, it seems to be established by the verdict that, at least up to the time of the execution being placed in the hands of the sheriff by the plaintiffs, the mortgage was a valid instrument in their hands, and vested in them the legal title to all the property it purported to convey, subject to be defeated only by payment and satisfaction, or voluntary waiver or surrender.

It remains to be seen whether the plaintiffs have in any way divested themselves of their title to the property thus acquired, or been guilty of any acts which would authorize the court to estop them from asserting their rights under the mortgage.

[The learned Judge examines this question at length, and comes to the conclusion that the plaintiffs have, by pursuing their remedy under the judgment, so dealt with the property in question as to preclude themselves from setting up their title to it under the mortgage.]

New trial granted.

BUSH v. COOPER

HIGH COURT OF ERRORS AND APPEALS OF MISSISSIPPI, 1853

(26 Miss. 599)

MR. JUSTICE HANDY delivered the opinion of the court.

This bill was filed by the appellee (Cooper) in the Superior Court of Chancery, to foreclose a deed in trust executed by the appellant (Bush) on the 17th March, 1840, conveying certain real estate in the town of Port Gibson to trustees to secure the payment of two

promissory notes made by the appellant, and afterwards transferred to the appellee. The facts necessary to be taken into view in considering the questions presented for determination are as follows:—

The notes secured by the trust deed were due in January and February, 1841; and in November, 1842, a judgment at law was rendered upon them against Bush, which judgment and the deed in trust were afterwards transferred to the appellee, and remain unpaid. The deed, in conveying the property, contains the words "grant, bargain, and sell," but contains no other covenant of warranty in express terms.

The appellant was discharged as a bankrupt in February, 1843; and in October, 1844, he purchased the property embraced in the deed in trust at sheriff's sale, under an execution on a judgment rendered in June, 1838, against the appellant, and which was unsatisfied, for the sum of \$1,033, by means acquired by him after his discharge as a bankrupt; and in virtue of that purchase, he now claims to hold the property by title paramount to the lien of the deed in trust. On the contrary, the appellee claims that the property is subject to the payment of the debt secured by the deed in trust, notwithstanding the discharge of the appellant as a bankrupt, and that the appellant's purchase, under the prior incumbrance, cannot be set up by him to defeat the security of the deed in trust.

The first question to be settled is, whether the discharge of the appellant from the debt, by his certificate as a bankrupt, extinguished the deed in trust.)

It is insisted on his behalf that the deed was but a mere incident to the debt, and that whatever discharged the debt necessarily destroyed the deed, because the security could not exist where the debt, which was its foundation and support, was discharged. This is undoubtedly well sustained by modern decisions, as a general rule, but it is not without exceptions. It is held to apply in all cases where the debt has been actually paid, or where it was not supported by a valid legal consideration, or where the debtor *ex æquo et bono* is discharged from its payment. But it is held not to apply to a case where an action upon the debt has been barred by the statute of limitations, and that the creditor may proceed to foreclose his mortgage, notwithstanding the bar of the debt by the statute. (*Miller v. Helm*, 2 S. & M. 697; *Miller v. Trustees of Jefferson College*, 5 Ib. 650; *Bank Metropolis v. Guttschlick*, 14 Peters, 19; *Thayer v. Mann*, 19 Pick. 535.) }

In addition to this, the objection is fully met by the second sec-

tion of the bankrupt act of Congress of 1841, which provides that "nothing in the act shall be construed to annul, destroy, or impair any lawful rights of married women or minors, or any liens, mortgages, or other securities on property, real or personal," &c. From this it is manifest that, while the privilege was granted to the debtor to be personally discharged from the debt, any security which the creditor might have, consisting of a lien on property, was left in as full force as though the debtor had never been discharged from the debt, for the security of which the lien was made.

The second question, then, presented is, Whether Bush is estopped by the deed from setting up his title acquired under the judgment, which was a lien existing at the date of the deed, in opposition to the title conveyed by the deed? This is a question of great importance in its direct and collateral bearings, and it has been carefully considered by the court.

[The Court then discusses at length the question of the effect of the appellant's discharge in bankruptcy upon the estoppel arising from the covenants in his deed of trust, and concludes as follows:]

It follows from this view of the subject that the appellant was not discharged from his covenants in the deed, and consequently that he is estopped from setting up his subsequently acquired title against the claim of the appellee. As a legal proposition this conclusion is well sustained by expositions given to the bankrupt laws by very high authorities. In an equitable point of view, the position of the appellant would not be more favored. After having pledged the property as a security for the payment of the debt, he would scarcely be heard, in point of mere equity, to set up a claim to the same property, founded on the existence of a prior lien which he had covenanted against, and thereby deprive his creditor of the security he had given, and appropriate the property to himself.

The decree of the chancellor is affirmed.¹

PRATT v. HUGGINS

SUPREME COURT OF NEW YORK, 1859

(29 Barb. 277)

HOGEBOM, J. The facts of this case lie within a narrow compass. The plaintiff, by action commenced in 1855, seeks to foreclose a mortgage under seal, executed in 1835, for a debt falling due in 1836, which mortgage was accompanied by a promissory

¹ See, *Chamberlain v. Meeder*, 16 N. H. 381 (1844).

(unsealed) note to secure the same debt. The mortgage contains no covenant to pay, but the condition is that the instrument shall be void if the above sum, with interest, is paid on the 1st of February, 1836, "in the manner particularly specified in the condition of his (the mortgagor's) certain bond or obligation bearing even date herewith." The mortgage was duly acknowledged and recorded. The answers interposed several defenses; and among others, the defense of payment; and that the plaintiff's cause of action was barred by the statute of limitations, in consequence of its not accruing within six years before suit brought. The justice before whom the cause was tried, without a jury, came to the conclusion, upon the evidence, that there was an unpaid balance due on the note, and that he should have given judgment for the plaintiff but for the fact that more than six years had elapsed since the said note became due, and the cause of action thereon accrued prior to the commencement of this suit; and for that reason he gave judgment for the defendants. The case therefore presents the question whether a debt secured by a sealed mortgage and an unsealed note can be enforced by a foreclosure of the mortgage, after the expiration of six but before the expiration of twenty years from the time when the debt became due. As has been said, there is no covenant in the mortgage to pay the debt; but at the same time the debt, its amount and the time of payment, are specified in the mortgage; and it is provided that in case "default shall be made in the payment of all or any part of the said principal sum of two hundred and fifty dollars, or the interest thereof, at the time or times when the same ought to be paid as aforesaid, that then, and in such case," the mortgagee may sell and dispose of the premises, &c. The true question, therefore, would seem to be, has the mortgage been paid? or, rather, in this case, is the lapse of six years since the maturity of the note, without any subsequent recognition or acknowledgment of the debt, conclusive evidence of payment? The justice trying the cause has come to the conclusion, upon the evidence, that a part of the debt is actually unpaid. Is there a legal bar to giving effect to that conclusion by rendering judgment for the plaintiff, in consequence of the lapse of time before mentioned? If this is substantially an action upon the note, then it is barred, for it is an action upon simple contract and must be brought within six years. (Code, § 90.) And the plaintiff in such case fails, not because the debt is in fact shown to be paid, but because the law forbids the action. The remedy is taken away. But this is not in terms or effect an action upon the note. The

mortgage would be good without the note. If there had been no note, but only the evidence of the debt recognized in the mortgage, is there any doubt that the mortgage could have been enforced after the debt became due, and for twenty years afterwards? The only question would be, was there a debt remaining unpaid—a security upon real estate—and was the lien enforced during the period that the law gives it legal existence? The additional recognition of the debt, in the shape of a promissory note, ought not to detract from its force. It is said that the note is the principal, and the mortgage only the incident; that is, that it is given only as a security for the note. In a certain sense, this is true. But in fact the debt itself is the principal thing, and the note is one form of security for, or evidence of, the debt, and the mortgage another. Suppose the mortgage contained a covenant to pay the debt, would it be any the less the principal thing than the note? True, the note (if negotiable) would have some facilities for an easy transfer, and might be negotiated independent of the mortgage. If so transferred, it would in law carry the mortgage with it, and so would the mortgage carry the note with it. The payment of either would be the payment of the other, except so far as a *bonâ fide* holder of the note for value is concerned, who might, under the law applicable to commercial paper, be protected. It is said that the note, from the lapse of time, is presumed to be paid. Not altogether so; for the law allows a suit upon it and a recovery, unless the statute of limitations is pleaded. It is therefore, at most, but a presumption; suffered to be overthrown, it is true, only in one way, and that is, by proof of payment thereon, or recognition thereof, in the way pointed out in the statute. This, however, as before stated, only acts upon the remedy. It is an arbitrary and an artificial rule, not to be carried, I think, beyond the well-defined limits of the statute itself. The case of *Jackson v. Sackett*, 7 Wend. 94, is much relied on as decisive authority in support of the bar. That was ejectment upon a forfeited mortgage, secured also by a note. The tenor of Mr. Justice Sutherland's able opinion is towards regarding the lapse of six years, unexplained, as sufficient evidence of payment. But he held that the bar was not absolute, and that circumstances tending to show that the note was unpaid were proper for the consideration of the jury, and a new trial was in fact granted for withdrawing the case from the jury. We are not precisely apprised by the case at bar what circumstances here exist; but we are told in the case itself that the plaintiff gave evidence "tending to show that there was due upon the mortgage about the sum of \$70;

that no part of the said sum, or the interest thereon, had been paid." And the judge also says, "I am entirely satisfied from the evidence that there is an unpaid balance due on the note, and should have decided in the plaintiff's favor, except for the legal bar above stated." The late chancellor (Walworth) doubts, and even denies, the authority of the last cited case, in *Heyer v. Pruyn*, 7 Paige, 465, and goes so far as to say that it "cannot be law." The cases in Massachusetts and Connecticut, and one in Kentucky, hold that notwithstanding that "the note may be barred by the statute of limitations, yet if it has not been paid, the mortgagee has his remedy on the mortgage." (*Thayer v. Mann*, 19 Pick. 535; *Bush v. Cooper*, 26 Miss. [4 Cush.] 599; *Eastman v. Foster*, 8 Metc. 535; *Baldwin v. Norton*, 2 Conn. 163; 14 B. Monroe [Kentucky], 307. See also 2 Cox's Chancery Cases, 125; *Spears v. Hartly*, 3 Esp. R. 81, 2; Hilliard on Mortgages, 21, 22.) The case of the *Bank of the Metropolis v. Guttschlick*, 14 Peters, 19, declares a kindred and nearly analogous principle. The case of *Waltermire v. Westover*, 14 N. Y. R. 16, has also, particularly in the reasoning of Mr. Justice Selden, some bearing upon the present case. In that case the lien of a justice's judgment, which according to the statute would be barred after six years for the purpose of bringing an action thereon, was, when a transcript was filed in the county clerk's office, recognized as of equal validity and duration with that of a judgment originally entered in the common pleas, and extended to ten years as against subsequent creditors. It is true much stress was laid upon the language of the statute giving such a judgment the same force and effect as a judgment of the common pleas, but much stress was also laid upon the fact that there was nothing to prevent the enforcement of such a lien, except the language of the law of limitations; and it was considered that that language might be appropriately limited to cases directly within its terms; that there was reason for saying that the debt still remained, notwithstanding the statute had cut off the remedy when resorted to in the shape of an action. A distinction was drawn between the institution of a suit upon the justice's judgment and the enforcement of it as a lien upon real estate; and I think here a distinction may be drawn between an action upon the note for the purpose of enforcing a personal liability and an action upon the mortgage for the purpose of enforcing the lien upon the real estate. This question, in this State, may be said to be nearly *res nova*, and I feel authorized to follow the weight of judicial authority elsewhere, resting, as I think it does, upon principle, especially

as the case in 7th Wendell is not directly hostile to the rule here suggested. The judgment should be reversed and a new trial granted, with costs to abide the event.

WRIGHT, J., concurred.¹

New trial granted.²

BORST v. COREY

COURT OF APPEALS OF NEW YORK, 1857

(15 N. Y. 505)

ON the tenth of August, 1837, the plaintiff and the defendant, Samuel Newkirk, as executors of the last will and testament of James Halliday, deceased, conveyed to the defendant, David P. Corey, a piece of land in Montgomery county for \$1,600, subject, however, to a mortgage thereon for about \$635, and this action was commenced August 5th, 1847, in the Supreme Court, on the equity side, to obtain a sale of the premises, by virtue of the equitable lien for the purchase price. The complaint in the action set forth the conveyance of the premises by the executors, alleged that no part of the purchase price had been paid by the grantee except the amount of the mortgage, and asked for a decree that the premises be sold and the purchase price and interest be paid from the proceeds of the sale. The complaint further alleged that the executor, Newkirk, had refused to join with the plaintiff in the commencement and prosecution of the action, and was therefore made a defendant.

The defendant, Newkirk, suffered the bill to be taken as confessed. The defendant Corey, by his answer, alleged that prior to the delivery of the deed to him he paid the purchase price of the land in full, except the amount of mortgage thereon, and had subsequently paid the mortgage; and that he had not, at any time within six years next prior to the commencement of the action, been indebted to the executors or either of them, for or on account of the purchase price of the premises, or promised to pay the same; and that no cause of action had accrued for the same within the six years. To this answer a general replication was put in.

The action was tried before referees, and they found that more

¹ Concurring opinion of GOULD, J., 160 (1836); *Hulbert v. Clark*, 128 N. Y. 295 (1891).
omitted.

² See, *Bolknap v. Gleason*, 11 Conn.

than six years had elapsed since the sale of the premises in question, prior to the commencement of the action, and decided that the plaintiff be nonsuited, on the ground that the cause of action, to enforce which the suit was brought, was barred by the statute of limitations. No bond or mortgage, or other written instrument, was taken to secure the payment of the purchase price of the land, and it does not appear that any credit was given therefor.

Judgment having been entered on the report, the plaintiff appealed therefrom; the Supreme Court, at general term, in the third district, affirmed the judgment, and the plaintiff appealed to this court.

BOWEN, J. The purchase price of the land in question was due and payable on the conveyance of the land to the defendant Corey, and as this action was not commenced until more than six years after the conveyance, and as no promise to pay was shown to have been made within six years, the statute of limitations would have been a complete bar to an action at law to recover the purchase price. (2 R. S. 295, § 18.)

This action, however, was one of equitable cognizance. At the time of the commencement of the action, the relief sought to be obtained in the manner applied for, that is, by a sale of the premises under the equitable lien thereon for the purchase price, could have been awarded by a court of equity only.

An action at law, if commenced at any time within six years after the conveyance, could have been maintained against the defendant Corey, in which a judgment against him personally would have been rendered. The object of such an action, and the relief sought for therein, would have been the recovery of the unpaid purchase price of the land. The same relief, and no other or different, is sought to be obtained in this action, and a court of equity was resorted to solely for the reason that courts of common law jurisdiction could not award relief otherwise than by a judgment against the defendant personally. The same facts which would constitute a defence to the action at law would also be a defence to this action, unless the statute of limitations be an exception.

So, too, the cause of action, to wit, the non-payment of the purchase price of the land, is the same, whichever court is resorted to.

It is true that, to sustain the suit in equity, the plaintiff must bring to his aid the equitable lien given by law, while the action at law can be sustained without reference to such lien. But the lien is merely an incident to, and must stand or fall with the debt. }

The debt is the basis or foundation of the lien. The latter cannot exist without, or independently of the former. In the suit to enforce the lien, the cause of action, and the only substantial cause of action, is the debt.

The forty-ninth section of the title of the Revised Statutes entitled, "Of the time of commencing actions" (2 R. S. 301), provides that "whenever there is a concurrent jurisdiction in the courts of common law and in courts of equity, of any cause of action, the provisions of this title, limiting a time for the commencement of a suit for such cause of action in a court of common law, shall apply to all suits hereafter to be brought for the same cause in the Court of Chancery."

I do not see why this case does not come within the letter of the above provision. It certainly does, if I am right in supposing that the defendant's indebtedness for the purchase price of the land constitutes, in the language of the statute, the plaintiff's "cause of action."

It is claimed by the plaintiff's counsel that if the language of the forty-ninth section is sufficiently broad to include this case, the fiftieth section excepts it therefrom. This section provides that "the last" (§ 49) "section shall not extend to suits over the subject-matter of which a court of equity has peculiar and exclusive jurisdiction, and which subject-matter is not cognizable in the courts of common law."

The term "subject-matter" of suits, as used in this section, is synonymous with the term "cause of action," contained in the preceding forty-ninth section. No other definition can be given to the phrase as applicable to this case. It is said that "the subject-matter" of this suit is the equitable lien, of which a court of law cannot take cognizance; while, if a suit at law had been brought to recover the purchase price of the land, "the subject-matter" of the action would have been the debt. But, as before shown, the lien is a mere incident to the debt, being given solely to secure its payment. If the lien can be said to be, in any sense, the "subject-matter" of this action, it is so merely as incidental to the debt, the latter being the principal and fundamental "subject-matter" of the suit, as much so as it would be of an action at law to recover the debt. I do not think that the fiftieth section excepts this case from the operation of the previous section.

Prior to the Revised Statutes there was no statute in this state limiting the time for commencing actions in courts of equity. Yet, previously to the adoption of those Statutes, it was frequently held

that, in cases where there was a concurrent jurisdiction at law and in equity, time was as absolute a defence to the action in equity as to one at law; not on the ground of expediency, or as a matter of discretion founded on analogy to the statute of limitations, as was the case in some actions of purely equitable cognizance, but in obedience to the statute. (*Rosevelt v. Mark*, 6 John. Ch. R. 266; *Kane v. Bloodgood*, 7 *id.* 90; *Murray v. Coster*, 20 John. 576; *Sawyer v. De Meyer*, 2 Paige, 574; *Humber v. Trinity Church*, 7 *id.* 195; 24 Wend. 587; Story's Eq., § 529.)

I think this case comes within the principle established by the above authorities, and that, independently of the statutory provision limiting the time of commencing actions in courts of equity, it should be held that the six years' limitation to actions at law constitutes a defence to this action. The provision of the Revised Statutes limiting the time of commencing actions in courts of equity was adopted as declaratory of the law as it then existed, and not as introducing a new rule. (3 R. S. 705, revisers' notes.)

It would be an anomaly if the plaintiff could recover his debt by an action to enforce the lien given to secure the debt, when no action could be sustained to recover the debt directly without reference to the lien. There is no reason why the limitation should be applicable in the one case and not in the other.

It has, however, been held that where a mortgage was given to secure the payment of a simple contract debt, the statute limiting the time for commencing actions for the recovery of such debts was no bar to an action to foreclose the mortgage. (*Balch v. Onion*, 4 Cush. 559; *Thayer v. Mann*, 19 Pick. 535; *Elkin v. Edwards*, 8 Geo. 325; *Heyer v. Pruyn*, 7 Paige, 465.)

But there is a material distinction between a mortgage and the equitable lien for the purchase price of land given by law, and also between an action to foreclose a mortgage and one to enforce such a lien. The action to foreclose a mortgage is brought upon an instrument under seal, which acknowledges the existence of the debt to secure which the mortgage is given; and by reason of the seal the debt is not presumed to have been paid until the expiration of twenty years after it becomes due and payable. The six years' limitation has no application to a mortgage. In fact, all instruments under seal are expressly excepted therefrom. No action at law can be predicated upon the mortgage, to collect the debt secured thereby, unless there is contained therein a covenant to pay the debt. A debt secured by deed is said to be of a higher nature than one by simple contract. On the contrary, the equitable lien

is neither created or evidenced by deed, but arises by operation of law, and is of no higher nature than the debt which it secures. It must coexist with the debt and cannot survive it.

It is true, as claimed by the plaintiff's counsel, that the statute of limitations does not extinguish the debt; it only bars the remedy. But the remedy by action at law is no less barred than that by suit in equity to enforce the lien. The *Mayor, &c., of New York v. Colgate*, 2 Kern. 140, is relied upon by the plaintiff as an authority sustaining his position. That was an action for the collection of an assessment to defray the expenses of improving a street in the city of New York, under and by virtue of a lien upon certain lands in the city deemed to be benefited by the improvement, and upon which the assessment was made. The action was not commenced until more than six years after the assessment was made, and had become due and payable, and the six years' limitation was set up as a defence to the action.

The statute authorizing the assessment, and prescribing the remedies for its collection, provided that the sums thus assessed should be a lien or charge upon the houses and lots in respect to which the assessment was made, and might be sued for and recovered with costs, in like manner as if such houses and lots were mortgaged to the corporation for the payment thereof. The assessment was thus made, in effect, a mortgage with all its incidents, one of which was that payment was not to be presumed until the expiration of twenty years; and it was upon that ground that Judge Denio held that the six years' limitation did not apply, while Chief Judge Gardiner based his opinion on the ground that the assessment was in the nature of a judgment. In either view, the case is distinguishable from the one under consideration.

I think the judgment should be affirmed.

DENIO, C. J., delivered an opinion for affirmance upon substantially the same grounds as those stated by Bowen, J.

All the judges except Brown, J. (who did not vote), concurring in this opinion,¹

Judgment affirmed.

¹ *Trotter v. Erwin*, 27 Miss. 772 (1854), accord. *Lingan v. Henderson*, 1 Bland. Ch. (Md.) 236 (1827), contra. And see *Hulbert v. Clark*, 128 N. Y. 295, 300, where it is said of

Borst v. Corey that "the reasoning by which the result was reached in that case is not altogether satisfactory."

LORD v. MORRIS

SUPREME COURT OF CALIFORNIA, 1861

(18 Cal. 482)

Plaintiff appeals.

FIELD, C. J., delivered the opinion of the Court, BALDWIN, J., and COPE, J., concurring.

The questions presented by the record for determination are: first,¹ whether, when an action upon a promissory note, secured by a mortgage of the same date upon real property, is barred by the Statute of Limitations, the mortgagee has any remedy upon the mortgage.

The Statute of Limitations of this State differs essentially from the statute of James I., and from the statutes of limitation in force in most of the other States. Those statutes apply in their terms only to particular legal remedies, and hence Courts of Equity are said not to be bound by them except in cases of concurrent jurisdiction. In other cases Courts of Equity are said to act merely by analogy to the statutes, and not in obedience to them. Those statutes as a general thing also apply, so far as actions upon written contracts not of record are concerned, only to actions upon simple contracts—that is, contracts not under seal, fixing the limitation at six years, and leaving actions upon specialties to be met by the presumption established by the rule of the common law, that after a lapse of twenty years the claim has been satisfied. In those statutes, where specialties are mentioned, as in the statutes of Ohio and of Georgia, the limitation is generally fixed either at fifteen or twenty years. The case is entirely different in this State. Here the statute applies equally to actions at law and to suits in equity. It is directed to the subject-matter and not to the form of the action, or the forum in which the action is prosecuted. Nor is there any distinction in the limitation prescribed between simple contracts in writing and specialties. Thus the statute requires an action "upon any contract, obligation, or liability founded upon an instrument of writing," except a judgment or decree of a Court of a State or Territory, or of the United States, to be commenced within four years after the cause of action has accrued. It matters not whether damages be sought for

¹ The opinion upon the first point only is given.

a breach of the contract, and thus an action at law be brought, or a specific performance be prayed, and thus a suit in equity be commenced: the proceeding must in either case be taken within the limitation designated. (See *Pearis v. Covillaud*, 6 Cal. 617.) The statute, after prescribing certain periods within which actions upon judgments, upon simple contracts, for relief on the ground of fraud, and for other causes, shall be brought, declares in general terms that "an action for relief," not thus provided for, must be commenced within four years after the cause of action shall have accrued—covering all cases where equitable or other relief may be sought.

(A mortgage in this State also differs materially from a mortgage at common law, or a mortgage in our sister States. At common law a mortgage of real property was regarded as a conveyance of a conditional estate, which became absolute upon condition broken. It gave to the mortgagee, except as otherwise stipulated by provisions inserted in the instrument, a present right of possession. Upon it the mortgagee could enter peaceably, or bring ejectment, or a writ of entry; and in those States where the common law view has been modified by considerations arising from the real object of the instrument and the nature of the transaction, it is still generally held that, as between the parties, it passes the fee and gives a remedy to the mortgagee for the possession, though as to third persons it constitutes only a lien or charge, and leaves the mortgagor the owner of the premises. Thus in *Ewer v. Hobbs*, 5 Met. 3, Chief Justice Shaw, in delivering the opinion of the Supreme Court of Massachusetts, after stating the object of a mortgage said: "Hence it is that, as between mortgagor and mortgagee, the mortgage is to be regarded as a conveyance in fee, because that construction best secures him in his remedy, and his ultimate right to the estate, and to its incidents, the rents and profits. But in all other respects, until foreclosure, when the mortgagee becomes the absolute owner, the mortgage is deemed to be a lien or charge, subject to which the estate may be conveyed, attached, and in other respects dealt with as the estate of the mortgagor." And in the subsequent case of *Howard v. Robinson*, 5 Cush. 123, the same distinguished Justice said: "Although, as between mortgagor and mortgagee, it is a transmission of the fee which gives the mortgagee a remedy in the form of a real action and constitutes a legal seisin, yet to most other purposes a mortgage before the entry of the mortgagee is but a pledge and real lien, leaving the mortgagor for most purposes the owner." The

doctrine with respect to mortgages is very different in this State. Here a mortgage is regarded as between the parties, as well as with reference to the rights of the mortgagor in his dealings with third persons, as a mere security, creating a lien or charge upon the property, and not as a conveyance vesting any estate in the premises, either before or after condition broken. Here it confers no right to the possession of the premises either before or after default, and, of course, furnishes no support to an action of ejectment, or to a writ of entry for their recovery. The language of the statute is express that it shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession without a foreclosure and sale. (See Pr. Act, sec. 260; *McMillan v. Richards*, 9 Cal. 411; *Nagle v. Macy*, *id.* 428; *Johnson v. Sherman*, 15 *id.* 293; *Goodenow v. Ewer*, 16 *id.* 464; *Boggs v. Hargrave*, 16 *id.* 563; *Fogarty v. Sawyer*, 17 *id.* 592.)

From this statement as to the Statute of Limitations, and the operation of a mortgage upon the right of possession in this State, it is evident that the decisions cited from the reports of other States, to the effect that a mortgagee has a remedy upon his mortgage after the Statute of Limitations has run upon the promissory note for the payment of which the mortgage was executed, have no application to the questions presented for consideration in the case at bar. Those decisions are founded upon distinctions made by the statutes of limitations of those States which do not exist in the statute of this State, or upon the right of possession which there accompanies the ownership of the mortgage. Thus in *Elkins v. Edwards*, 8 Geo. 326, which was a suit for the foreclosure of a mortgage, the Supreme Court of Georgia said: "Because the remedy on the note is barred by the statute in six years, it does not follow that the creditor's remedy on the mortgage, being a sealed instrument, is also barred. The creditor's remedy on the mortgage is not barred until twenty years—the debt being unpaid." So in *Thayer v. Mann*, 19 Pick. 535, which was a writ of entry to recover possession of the mortgaged premises, the Supreme Court of Massachusetts said: "The creditor has a double remedy, one upon his deed to recover the land, another upon the note to recover a judgment and execution for the debt; and it does not follow that he cannot recover on one, although there may be some technical objection or difficulty to his remedy upon the other." These decisions are no authority in the case under consideration, for the reasons already given, that the statute makes no distinction in the period of limitation between a simple contract in writing and a

contract under seal, and a mortgage deed here does not confer any right of possession upon the mortgagee. It is undoubtedly true, as stated by the Court in the case from Georgia, that the creditor stipulated by contract for two remedies against his debtor to enforce the collection of his demand—the one by action upon the note, and the other by petition and foreclosure upon the mortgage. Similar remedies he can pursue in this State. He can proceed upon the note, and take an ordinary money judgment for the amount due; or he can sue in equity upon the mortgage, and take a decree for its foreclosure and the sale of the premises. The difference is, that here the limitation prescribed to the equitable suit is the same as that prescribed to the action at law. The mortgage is as much within the general designation of a “contract, obligation, or liability, founded upon an instrument of writing,” as is the note itself.

We do not question the correctness of the general doctrine prevailing in the courts of several of the States, that a mortgage remains in force until the debt for the security of which it is given is paid. We only hold that the doctrine has no application under the Statute of Limitations of this State. A mortgage is a specialty, and is not within the terms of the English statute, or of the statutes of most of the States. An action founded upon such specialty can only be met by proof of payment. The payment may be established by direct evidence of the fact, and it may be presumed from the lapse of twenty years, when such presumption is not countervailed by evidence from the mortgagee. “Thus,” says the Supreme Court of Maine in *Joy v. Adams*, 26 Maine, 333, “a mortgage security has not been deemed to be within any branch of the Statute of Limitations. He who would avoid such security must show payment; otherwise, the mortgagee will not be precluded from entering upon and holding possession of the mortgaged premises. The mortgagor has not been allowed to defeat such right by showing merely that the personal security, to which the mortgage security is collateral, has become barred (*Thayer v. Mann*, 19 Pick. 535); but he has been allowed to allege payment, and for proof to rely upon the lapse of time, when it amounted to twenty years from the accruing of the indebtedment. Such a lapse of time has been deemed to be sufficient for the purpose, in the absence of any countervailing considerations. This is admitted as a presumption of law, which may be removed by circumstances tending to produce a contrary presumption.” The view thus stated is met by our statute, which embraces a mortgage security

within its terms. Here payment may be pleaded, and so may the statute itself without reference to the fact of payment.

Our conclusion, therefore, upon the first question presented is, that where an action upon a promissory note, secured by a mortgage of the same date upon real property, is barred by the statute, the mortgagee has no remedy upon the mortgage; that though distinct remedies may be pursued by him, the limitation prescribed is the same to both.

*Judgment affirmed.*¹

HARRIS v. MILLS

SUPREME COURT OF ILLINOIS, 1862

(28 Ill. 44)

WALKER, J. This bill was exhibited to foreclose a mortgage, given to secure a note alleged to have been lost. The mortgage bears date the 12th of May, 1837, and recites a note for seven hundred dollars. The note is alleged to have been given on the 9th of April, 1836, by Edwin Mills to appellant, due on the 9th day of September, 1838. The mortgage was not recorded until the 8th day of November, 1855, and appears never to have been acknowledged. It also appears that Edwin Mills, on the 13th day of January, 1839, executed a mortgage on the same land to secure two thousand dollars to Harlow Mills, for indebtedness due to him. This latter mortgage was acknowledged and recorded. Edwin Mills, on the 17th day of February, 1842, conveyed the mortgaged premises to Harlow Mills for the expressed consideration of two thousand dollars. This deed was recorded on the 4th of August, 1842, in the proper office.

The bill charges that this deed and mortgage, from Edwin to Harlow Mills, are without consideration, and are fraudulent and void. It is also charged that they were taken by Harlow with full notice of appellant's prior mortgage. The answer alleges that a consideration was given, and denies all notice of the prior mortgage. The answer also sets up, and relies upon, the lapse of more than sixteen years after the maturity of the note and before the exhibition of the bill, as a bar to a foreclosure. On the hearing, the court below dismissed the bill and rendered a decree against complainant for costs, to reverse which he prosecutes this appeal.

¹ But that the mortgagor is not *De Cazara v. Oreña*, 80 Cal. 132 entitled to affirmative relief, see (1889).

The principal question presented by this record is this: the statute of limitations having barred a recovery by suit on the note, does it form a bar to a foreclosure of the mortgage by bill in equity? Had this been an action on the note, over sixteen years having elapsed after the maturity of the note, the recovery would have been barred. If such an action had been instituted, and a recovery defeated, the judgment could have been interposed as a successful bar to a foreclosure. Or, had an ejectment been brought, and the bar of the statute allowed to defeat a recovery against Harlow Mills or those holding under him, the judgment might also have been relied upon to prevent a decree of foreclosure. Or, had a scire facias been sued, and had the statute of limitations been successfully interposed to defeat a recovery, the judgment might have been pleaded to avoid a foreclosure by bill. When the party has elected one of several remedies, and it results in a judgment against the mortgagee, that judgment becomes as complete a bar to a proceeding in a different form for a foreclosure as payment, release, or other discharge.

The question, however, still recurs, whether, after several remedies have been barred, but not established in a legal proceeding, the bar may be relied upon in other and different remedies? As a general rule, courts of equity follow the law in allowing the defense of the statute of limitations. A bar of the statute, at law, forms a bar in equity. (Story's Eq. Pl., § 500, § 751.) In equity, as at law, an acknowledgment that a debt is due, and a promise to pay it, will take it out of the operation of the statute. If the mortgagor is permitted to remain in possession twenty years after a breach of the condition, the right to file a bill to foreclose will be generally considered as barred and extinguished. Though in cases of this description, as the law is not positive, but is based upon presumption of payment, it is open to be rebutted by circumstances. (2 Story's Eq., § 1028, b.) This court has repeatedly held, in conformity to the general doctrine announced by the adjudged cases, that the debt is the principal thing and the mortgage is the incident. That the latter follows the consideration of the former. That an assignment of the note operates *ipso facto* to transfer the mortgage. That a payment, release or other discharge of a note satisfies and releases the mortgage. If we are to be controlled by analogy, no reason can be perceived why a bar to a recovery on the note should not produce the same effect on the mortgage.

In Great Britain it is usual to insert in the mortgage itself a covenant for the payment of the money. When such a covenant is

found in the mortgage, it being under seal, and the debt to secure which it was given is not, a bar to a recovery of the debt, if of a shorter period than a bar to a sealed instrument, could not affect the remedy on the covenant in the mortgage. If the statutory period necessary to bar an unsealed instrument be of shorter duration than a sealed instrument, a mortgage containing such a covenant given to secure the payment of a debt evidenced by an unsealed note would be governed by the longer period required to bar a recovery on sealed instruments. The mortgage in this case contains no such covenant. This being so, renders the decisions of the British courts on mortgages containing such covenants, and given to secure simple contracts, inapplicable to this case. The statute having barred a recovery on the note, because according to the theory upon which the statute is based, the presumption is that the debt has been paid. There is no evidence in this record showing any promise to take it out of the operation of the statute. These statutes are, emphatically, statutes of repose. Without their aid litigation would never be barred, and titles and possession of property would never be quieted. By the efflux of time, the loss of evidence, the death of witnesses, and the failure of memory, were it not for the bar of these statutes, great injustice would result. These considerations have induced all civilized nations to adopt such laws, differing in detail and in the period necessary to operate as a bar, but all based upon the same principles and to attain the same object. Nor need such enactments work injustice. Persons under disability have allowed to them ample opportunity, after the disability ceases to exist, for the assertion of their rights, and those not under disability have also ample opportunity, within the period of limitation, to assert theirs. To avoid loss the creditor has only to use reasonable diligence, to avoid the bar of the statute.

It has been said that no length of time will bar a foreclosure by a mortgagee out of possession. This is placed upon the ground that the relation of landlord and tenant is supposed to exist between the parties. But such is not the true relation of the parties. For some purposes, and to a limited extent only, a portion of the incidents are the same. To a limited extent, and for some purposes, the relation of vendor and vendee, and trustee and *cestui que trust*, also exists. The relation which the parties bear to each other is peculiar to itself, partaking in some degree of the incidents of these other relations, but analogous in all particulars to no one of them. Whilst a tenant, until he surrenders the possession to the landlord, cannot rely upon the statute, yet the mortgagor, by acquiring an

outstanding title and occupying the premises under it for the period, and upon the conditions imposed by the statute, may invoke its aid to prevent a foreclosure. Nor is he, like a tenant, required to account for rents and profits, bound to repair, nor is he impeachable for waste. Other courts have held, and such is clearly the weight of authority, that when the statutory period necessary to bar a recovery at law has elapsed, it will bar a foreclosure. (*Christophers v. Sparke*, 2 Jacob and W. 234; *Jackson v. Wood*, 12 J. R. 242; *Giles v. Barremore*, 5 J. R. 545; *Waterman v. Haskins*, *ibid.* 283; *Jackson v. Myers*, 3 J. R. 383; *Baker v. Evans*, 2 Car. S. R. 614; *Hugh v. Edwards*, 9 Wheat. 497; *Moore v. Cable*, 1 J. Ch. R. 385.) We are, therefore, for these reasons, of the opinion that when the note became barred by the statute the right to foreclose also became barred, unless the mortgage had contained a covenant for the payment of the money, when it might be that it would require twenty years to produce that effect, as an ejectment would not be barred, under the general limitation law, before that period, unless it be under the seven year limitation acts. No error is perceived in dismissing complainant's bill, and the decree of the court below must be affirmed.¹

Decree affirmed.

¹ *Pollock v. Maison*, 41 Ill. 516 (1866); *Newman v. DeLorimer*, 19 Ia. 244 (1865); *Schmucker v. Sibert*, 18 Kans. 104 (1877); *Lilly v. Dunn*, 96 Ind. 220 (1884); Ark. Dig. Stat.

L. (1894), § 5094; Miss. Ann. Code (1892), § 2733; Mo. Rev. Stats. (1899), § 4276, *accord*. Compare *Von Campe v. City of Chicago*, 140 Ill. 361 (1892).

CHAPTER VI

PRIORITIES

FULLERTON *v.* PROVINCIAL BANK OF IRELAND

HOUSE OF LORDS, 1903

(*L. R.* [1903] *A. C.* 309)

THIS Appeal turned on the construction of letters.

In the spring of 1895 Colonel Stevenson having overdrawn his account with the Provincial Bank of Ireland was asked by the bank to reduce the debt. He wrote several letters to the manager in which he said that he was buying an estate and when he received the conveyance he would deposit the deed as a security for the overdraft. In July, 1895, he deposited the conveyance with the bank. In July, 1896, he executed a mortgage of the estate in favour of the appellants. This mortgage was registered in the Dublin Registry of Deeds by the appellants without notice of the prior charge. Colonel Stevenson afterwards sold the estate under the Irish Land Purchase Acts, and it became necessary to decide the priorities of the above two incumbrances.

MEREDITH, J., held that upon the true construction of the letters they contained an undertaking to deposit the conveyance, and therefore amounted to an equitable charge of the estate in favour of the bank, and that as the charge had not been registered as required by 6 Anne (Ir.), c. 2, the mortgage held by the appellants which was registered had priority over the claim of the bank. The Irish Court of Appeal (FitzGibbon and Holmes, L. JJ., Walker, L. J., dissenting) reversed that decision, holding that the letters did not amount to an undertaking to deposit the conveyance, that registration was therefore not necessary, and that the bank was entitled to priority over the appellants, on the principle laid down in *In re Burke*, (1881), 9 L. R. Ir. 24. From this decision the present appeal was brought.

Wylie, K. C., and Henry, K. C. (R. E. Osborne with them—Irish Bar), for the appellants, contended that the construction put

by Meredith, J., on the letters was the true one and that the decision of that learned judge was right.

Campbell, S. G. (Ir.), and Gordon, K. C. (Garrett Walker with them—Irish Bar), for the respondents, contended that the decision of the Court of Appeal was right on two grounds: first because there was no undertaking to deposit the conveyance, only a hope that the writer might be able to make the deposit; and secondly because even if the letters did amount to an undertaking, there was no consideration for it, no forbearance or giving of time on the part of the bank; and relied on the decision of *In re Burke*, (1881), 9 L. R. Ir. 24, where it was held that the bare deposit of title-deeds unaccompanied by any writing did not require registration under 6 Anne (Ir.), c. 2, and that the deposit took priority over a subsequent deed registered without notice of the deposit.

LORD MACNAGHTEN.¹ My Lords, the point raised by this appeal is a short point, and not, I think, one of any great difficulty.

The appellants and the respondents were both equitable incumbrancers on certain property in Westmeath known as the Portlemon estate, and there is a contest for priority between them. The Portlemon estate has now been sold. But at the commencement of the contest the equity of redemption was vested in a Colonel Stevenson, who acquired the property from a Mrs. Treacy; she conveyed it to him in consideration of the sum of 8000*l.*, which was secured on the property by a legal mortgage of even date with the conveyance.

The charge in favour of the appellants (who are the trustees of Colonel Stevenson's marriage settlement) was created by a deed of mortgage dated the 29th and duly registered on the 31st of July, 1896. There is no question as to the validity or the regularity of this mortgage.

The charge in favour of the respondents was created or completed by the deposit on July 15, 1895, of the conveyance to Colonel Stevenson of the Portlemon estate. Their incumbrance is, therefore, prior in date to that of the appellants.

The respondents' case is that they have not and never had any charge upon the property in question except the charge that was created by the deposit of Colonel Stevenson's conveyance; that they had, therefore, nothing to register; that the statute of Anne

¹ Portions of the opinions of Lords of Lords Shand, Robertson and Macnaghten and Davey have been Lindley have been omitted. The concurring opinions

has no application to their security, and that according to the law laid down in *In re Burke*, 9 L. R. Ir. 24, they are entitled to the priority which properly belongs to priority of date. }

The case of the appellants is that the deposit on which the respondents rely was accompanied or preceded by certain letters leading up to the actual deposit which were sufficient to create, and which did in fact create, a valid equitable charge on Colonel Stevenson's interest in the Portlemon estate; that these letters, therefore, or some or one of them ought to have been registered, and that for want of such registration the claim put forward on behalf of the respondents fails, and their alleged security must be held to be fraudulent and void against holders of a subsequent registered mortgage.

The whole question, therefore, depends on the meaning and effect of these letters. They were written by Colonel Stevenson to the local manager of the Provincial Bank at Londonderry, where Colonel Stevenson's account was kept.

The earliest in date is one of March 26th, 1895. The others are dated May 18, May 24, and June 7. When those letters were written the conveyance of the Portlemon estate to Colonel Stevenson was not in existence—the arrangement for the sale of the property to him was only in progress. The conveyance was not executed until July 11, 1895.

Throughout the letters, and more particularly in the letter of May 18, Colonel Stevenson is making out a case for indulgence and pleading for forbearance. Apparently the local manager had given him to understand that he himself was likely to get into trouble with the head office over the account, and on May 18 Colonel Stevenson writes: "All you require is a little patience, and my account will be put upon a satisfactory basis." That was the tone of the letters throughout. In addition, it is enough for me to remind your Lordships that at the outset of the correspondence on March 26, 1895, Colonel Stevenson writes: "When I receive the title-deeds of the Portlemon property from my solicitors I will have same at once lodged with you." That was a clear and definite statement on which the manager of the bank was apparently intended to rely. From that statement Colonel Stevenson never receded. He never qualified it. On the contrary, he repeated it more than once, and in one letter he refers to it as a thing which he had "undertaken."

My Lords, if these letters were serious letters meant to be taken seriously, I cannot doubt that they created a valid charge in }

equity attaching to Colonel Stevenson's interest in the Portlemon estate the very moment the property was conveyed to him, and carrying over his interest by way of security to the bank.

I therefore move your Lordships that the appeal be allowed, and the judgment of Meredith, J., restored with costs both here and below.

a } LORD DAVEY. My Lords, it might appear to some people that the policy of the Irish Registration Act was to postpone an unregistered transfer of property to a registered one, whether the non-registration arose from negligence or inadvertence or from the fact of the transfer having been effected without any document being executed which was capable of being registered. I must express my personal regret that it was not so held, but it is too late now for your Lordships to interfere with what has become the settled law and is expressed in *In re Burke*, 9 L. R. Ir. 24.

I am of opinion that the letters, reading them together, constituted a contract to create an equitable mortgage on the Portlemon estate as soon as the conveyance to Colonel Stevenson was completed. On that event taking place, the contract became absolute and bound the property in his hands. The letters, therefore, constituted a transfer to the bank of the equitable interest in the property, and constituted a conveyance within the meaning of the Registration Act. It ought, therefore, to have been registered in order to secure the priority of the bank; and not having been registered, I think the appellants who claim under a subsequent instrument which was registered are entitled to claim priority over the bank in respect of their advance.

Order of the Court of Appeal reversed; judgment of Meredith, J., restored with costs here and below.

SPRING v. SHORT

COURT OF APPEALS OF NEW YORK, 1882

(90 N. Y. 538)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made the second Monday of June, 1881, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was brought to foreclose a mortgage executed by

the defendant, George M. Spring, to the plaintiff, who is the father of the mortgagor.

The appellants are judgment creditors of the mortgagor. The defense set up by them, is, that the mortgage was executed without consideration, with intent to defraud creditors. The mortgage, although dated 11th of April, 1872, was not executed until the 5th of October, 1876. It was recorded on the day of its execution. The premises covered by the mortgage had been conveyed by the plaintiff to his said son on the day on which the mortgage bears date, and the Special Term found that the consideration of the mortgage was the purchase-price of said premises; that the mortgage and the bond to which it was collateral were executed pursuant to an agreement made at the date of said conveyance that the same should be executed to secure the said purchase-price. Upon those facts the Special Term held that the bond and mortgage were valid as against the mortgagor and his judgment creditors, the appellants.

The judgments of the appellants were all recovered subsequent to the execution and recording of the mortgage, but upon debts which accrued prior thereto, the credits were given under the supposition that the title of the debtor was unincumbered.

MILLER, J.¹ Upon the trial the court found that the consideration of the bond and mortgage, which are the subject of this action, was the purchase-price of the mortgaged premises which were conveyed by the plaintiff to his son George M. Spring, by deed dated April 11, 1872, and that the same were made and executed in pursuance of an agreement made at the date of said deed that the same should be executed and delivered to secure the purchase-price of said real estate, and held that the mortgage was a valid lien upon the premises against the mortgagor and the appellants in this action. There was evidence on the trial to sustain this finding, although there are circumstances and facts which tend to show that such was not the consideration of the mortgage. It is proved that there was no such agreement in writing; that this understanding was not communicated by the plaintiff to any person outside of his own immediate family; that the mortgagor had occupied the premises for a number of years prior to the execution of the deed; that he continued to occupy them and use them as his own until after the mortgage had been executed, with the consent and approval of the plaintiff; and that

¹ Portion of opinion dealing with another point omitted.

the appellants had no notice or knowledge of the agreement or of plaintiff's claim, and that they trusted the mortgagor under a belief that the premises were owned by him and were free from incumbrance. It also appears that when the mortgage was executed to the plaintiff he had knowledge of the fact that his son was embarrassed and that he took the mortgage with a view of having it recorded before the judgments of the appellants should be docketed against his son, and become liens on the land. There was also evidence of declarations made by the plaintiff to different persons to the effect that he had made a gift of the premises to his son and that his son was responsible, but this testimony was contradicted by the plaintiff.

The testimony to which we have referred as well as the circumstances surrounding the case present a question of fact as to whether the mortgage was executed in good faith for a valid consideration or was fraudulent. This it was the province of the court upon the trial to decide, and the court having found that the consideration was a valid one and in fact that the bond and mortgage were made to secure a lawful demand as hereinbefore stated, it cannot, we think, be fairly claimed that it was fraudulent and void by reason of a failure of consideration. It is insisted, however, by the counsel for the appellants that even although the court has found an agreement which would uphold the mortgage, as between the parties to the same, yet the court should not have sanctioned the right of the vendor to hold for an unlimited length of time a secret lien and allow the plaintiff to set it up to the exclusion of *bona fide* creditors. The question as to the extent to which a secret, equitable and unrecorded lien of a vendor, for unpaid purchase-money of lands sold and conveyed by him, exists as against a judgment creditor after the lien is recorded, or other parties than the vendee, must depend upon the facts and circumstances of the particular case. Such lien cannot exist generally against purchasers in good faith, under a conveyance of the legal estate, without notice, when the purchase-money has been paid. (See *Fisk v. Potter*, 2 Keyes, 64.)

The general rule stated applies more particularly to cases where it is sought to enforce an equitable lien for the purchase-money, which has never been put on record as against subsequent mortgagees or purchasers in good faith and for a valuable consideration. In such a case it is too clear to admit of any question that the rights of the person claiming such equitable lien should yield, by reason of his neglect, to the claims of subsequent incumbrancers

or purchasers, and it may well be asserted that a prior claimant for the purchase-money under such circumstances has, by his silence or neglect, yielded his right. In the case at bar the appellants' judgments were not recorded prior to the making, execution and recording of the plaintiff's mortgage, and they, therefore, occupied entirely a different position. A distinction also exists as to a judgment creditor who advances his money upon the faith of an unincumbered title upon the record, without notice, who is entitled to the lien acquired thereby in preference to the secret unrecorded lien of a vendor for part of the purchase-money, and he is to be regarded as a *quasi purchaser* for a valuable consideration without notice. (See *Hulett v. Whipple*, 58 Barb. 224.) The appellants are clearly not within this rule. In the first place their judgments are on record subsequent to the record of the mortgage of the plaintiff, and besides they are not in the position of judgment creditors who have advanced money without notice on the faith of a good title; they are merely ordinary creditors who have contracted a debt with another, supposing that he was the owner of property unincumbered and had ability to pay. That they were mistaken in this respect does not entitle them to the rights of a party who advances money, within the rule stated. In relying upon the responsibility of the mortgagor it must be assumed that, as in the case with ordinary creditors, they took the chances of being mistaken, and unless a fraud has been committed by means of which the mortgagor's liability was created and the appellants defrauded, they occupy no other or no different position than ordinary creditors. The question as to the good faith of the mortgagor and the mortgagee in the transaction was the subject of consideration upon the trial, and the court, in view of the fact that the mortgage was not executed and recorded until long after the execution and recording of the deed and all of the circumstances, having found that it was executed in pursuance of the previous agreement made at the date of the deed to secure the purchase-money, we think the appellants have no ground for claiming that it could be regarded as a secret lien which entitled their judgments to a priority. Considering the finding referred to there is no principle laid down in the reported cases which authorizes the appellants to take precedence over the mortgage of the plaintiff. . . .

The judgment should be affirmed.

All concur, except RAPALLO and EARL, JJ., dissenting.
TRACY, J., absent.

PICKETT v. BARRON

SUPREME COURT OF NEW YORK, 1859

(29 Barbour, 505)

On the 24th day of July, 1855, the defendant Louis Barron executed his bond to Mary Tower, for the sum of \$200, and to secure the payment thereof, he, on the same day, with his wife, the other defendant, executed to said Mary Tower a mortgage on real estate in the city of Rochester. This mortgage was recorded in Monroe county clerk's office on the day of its execution. On the 30th day of January, 1856, Mary Tower sold and assigned this bond and mortgage to Elias Pond, for a valuable consideration, and at the time of the assignment, Louis Barron certified in writing that the bond and mortgage were valid, and that there was no defense thereto. On the 23d day of May, 1857, Elias Pond sold and assigned the same to John Greig, and on the same day, Greig assigned the bond and mortgage to Mary E. Barron, the wife of Louis Barron. This last assignment was never recorded; and according to the report of the referee it was understood by Barron and his wife, and Greig, that the same should not be recorded. Prior to the execution of the mortgage, the premises were conveyed to Mrs. Barron, by her husband, or by his procurement. On the 16th day of July, 1857, John Greig sold and assigned this bond and mortgage to the plaintiff, as collateral security for the payment of the sum of \$177.68. This action was brought to foreclose the mortgage, and the complaint contained the usual averments in such cases, and stated among others the above facts. The defendants, Louis Barron and his wife, answered separately. Mary E. Barron alleged that John Greig, on the 23d day of May, was the owner and holder of the bond and mortgage, and the moneys due and to grow due thereon; that he on that day sold and assigned the same to her, and that since that time she has been and now is the owner and holder thereof. Louis Barron, in his answer, alleged that on the 23d day of May, 1857, he paid to Elias Pond, the then holder and owner of the bond and mortgage, the money due thereon. The issues made by these pleadings were referred, for trial, to the Hon. Addison Gardiner. He found "that the consideration of the assignment of the bond and mortgage, from Greig to the plaintiff, was \$100 in money, and the balance of the sum mentioned in said assignment, \$77.68, consisted of an account for money lent and for

groceries delivered to said Greig, and to one Studley, which was then and there received and had by said Greig." He also found that the plaintiff made the advances and received the assignment of the bond and mortgage in good faith and without notice of any claim thereto in behalf of any other person. And he found, as conclusions of law, from the above facts, that the bond and mortgage were a valid security in the hands of the plaintiff for \$177.68 and interest; and that the plaintiff was entitled to judgment for that sum with costs. From the judgment entered at a special term, upon this report, the defendants appealed.

By the Court, E. DARVIN SMITH, J. The assignment by Greig to the plaintiff, of the bond and mortgage in controversy in this action, was a gross fraud. Whether or not the plaintiff can maintain his title to such bond and mortgage, acquired by such fraud, is the question arising on this appeal. At the time of the assignment, the bond and mortgage actually and equitably belonged to the defendant Mary E. Barron, but the assignment to her was not recorded. The statute (2 R. S. 40, § 1, 3d ed.) declares "that every unrecorded conveyance shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, whose conveyance shall be first duly recorded." The plaintiff's assignment was first recorded, and section 69 of the statute declares that the term "purchaser," as used in that statute, shall be construed to embrace "every assignee of a mortgage." The assignment from Greig to the plaintiff purports, upon its face, to have been made "as collateral security for \$177.68." The referee finds, and the proof clearly justified the finding, that \$100 in cash was advanced at the time of the assignment, in consideration thereof, and that the \$77.68 was for a pre-existing debt of Greig and one Studley to the plaintiff. The referee also finds that the plaintiff made the advance and took the assignment in good faith and without notice of any other claim to the bond and mortgage; and this finding on this question of fact is fully warranted by the evidence. The plaintiff, therefore, has an assignment of this bond and mortgage in due form from the apparent owner, as appeared from the record, together with the possession of the bond and mortgage itself, and is a subsequent purchaser in good faith, for a valuable consideration, and his conveyance is first recorded. His title to the bond and mortgage is therefore perfect under the statute.

But the plaintiff is not a *bona fide purchaser*, except as to the

\$100, advanced at the time of the assignment, So far as relates to the \$77.68, that was a past consideration, and the equity of Mrs. Barron is superior to his. To constitute a *bona fide purchaser* within the meaning of the recording acts, the party receiving the subsequent conveyance must not only have received the same without notice of the prior unrecorded *deed*, but he must have received the same upon some *new consideration* advanced at the time, or must have relinquished some security for a pre-existing debt due him. (*Dickerson v. Tillinghast*, 4 Paige, 222. *Stuart v. Kissam*, 2 Barb. 493. *Wood v. Chapin*, 3 Kern. 509.)

And when a party has obtained the legal title, if he has paid out a part of the consideration or value of the property, he is entitled to be considered a *bona fide purchaser pro tanto*. (*Peabody v. Fenton*, 3 Barb. Ch. 498. *Stalker v. McDonald*, 6 Hill, 96.) The case last cited, it is true, was the case of a promissory note. But the analogy between the case of a person claiming the rights of a *bona fide* holder of negotiable paper and a person claiming to be a subsequent purchaser for a valuable consideration, under the recording acts, is quite perfect, and there is no reason why the rule of law should not apply to them alike.

So far as the plaintiff took this bond and mortgage as a security for the debt of Greig and Studley, he is in no worse condition than he was before, and his equity is not superior to that of Mrs. Barron. Her prior equitable title and rights should prevail, except so far as the protection of the statute in express terms extends to the plaintiff as "*a subsequent purchaser in good faith and for a valuable consideration*," that is, so far as a new consideration was presently paid or advanced in consideration of the transfer of such bond and mortgage. The referee therefore erred, so far as he directs judgment for the plaintiff for all of the plaintiff's claim exceeding \$100 and interest thereon; and the judgment is so far erroneous. I am by no means sure that the assignment of the mortgage to Mrs. Barron did not merge the equitable into the legal estate so that nothing of interest in the mortgage remained capable of assignment to the plaintiff. But as this point was not raised before the referee, or considered by him, or particularly discussed here, I do not think it proper for the court now to pass upon that question. I think there should be a new trial, and as neither party has entirely succeeded, neither party should have costs of the appeal.

*New trial granted.*¹

¹ *Accord, Ten Eyck v. Witbeck*, 135 N. Y. 40, 47 (1892).

WHEELER v. KIRTLAND

COURT OF ERRORS AND APPEALS OF NEW JERSEY, 1873

(24 N. J. Eq. 552)

VAN SYCKEL, J.

The cross-appeals in these cases were argued and will be considered together.

It is a struggle between creditors for priority of payment of their several claims out of the estate of John Kirtland.

The conflicting claims are as follows:

1. A mortgage on real estate in Essex county, for \$4,000, dated July 1st, 1856, executed by John Kirtland to George W. Kirtland, his brother.

2. A mortgage on the same lands, for \$7,500, dated November 23d, 1864, by John Kirtland to George W. Kirtland as trustee for Catharine Kirtland, the wife of John, and for Jared T. Kirtland, a minor.

3. A judgment for \$16,695, recovered in the Essex Circuit Court, February 13th, 1865, by George W. Kirtland against John Kirtland and his son George Kirtland.

4. A judgment recovered by Andrew Henderson in the Essex Circuit Court, April 11th, 1865, for \$8,378, against the same defendants.

5. A judgment recovered by Wheeler and Green in the Supreme Court of this state, against said John and his son George, on the 16th day of December, 1869, for \$68,246.

Wheeler and Green attack the *bona fides* of the \$4,000 mortgage, and the judgment of George W. Kirtland. The evidence shows circumstances of strong suspicion against them, but the fraud is not proven with sufficient clearness to justify this court in setting them aside.

In 1862, Catharine Kirtland and her son George formed a partnership for the transaction of the business of brokers, under the firm name of Kirtland & Co., into which Catharine put a capital of about \$5,000, and George about \$250. They conducted the business until January 1st, 1864, when Catharine retired, and John, her husband, took her place in the firm, the name of which remained unchanged.

At the time Catharine withdrew from the firm, Kirtland & Co. were manifestly insolvent. At that time John did not agree to

pay her anything for her interest in the firm, and no promise will be implied, as it was worth nothing. All that she had in the business belonged to the creditors.

On the 23d of November, 1864, prior to which time the debt of Wheeler and Green had been contracted, John Kirtland executed the \$7,500 mortgage to George W. Kirtland as trustee, to secure to Catharine the sum which she had put in the firm, and to the minor, Jared T. Kirtland, the sum of \$1,500 of his funds, which had also been used in the same way. At the last mentioned date, John and his son George were insolvent, and they had no right to divert from their creditors any part of their assets and apply them to the payment of a claim for which neither of them was in anywise responsible. This mortgage, so far as it secured or attempted to secure the claim of Catharine, was purely voluntary, and therefore void as against creditors, but it is valid so far as it prefers the debt to Jared T. Kirtland. That was a just debt for money of the minor used by John in the transactions of the firm, and must, therefore, maintain its standing according to the date of the execution of the security. This mortgage is given to George W. Kirtland, trustee, and "his successors" instead of "his heirs," which the Kirtlands allege is a mistake, and they seek to have it reformed by substituting the word "heirs" for "successors." There is no evidence in the cause to show that there was any agreement that the fee should be conveyed, and the mortgage as it stands without the word "heirs," carries only the life estate. It is unnecessary, therefore, to discuss how far mortgages may be reformed or equitable liens established, as against creditors. There is no parol agreement which could be enforced under any view of the law. Where the equities are equal, the maxim is, "prior est in tempore, potior est in jure."

An equitable mortgage for a precedent debt has no equity superior to that of a valid subsequent judgment at law. Between such contestants, the first perfected legal lien should prevail. The rule is otherwise with regard to *bona fide* purchasers or equitable mortgagees, where the consideration of the mortgage is paid at the time it is given. Equity in the latter case regards the equitable mortgagee as a *bona fide* purchaser.

The entire indebtedness to Wheeler and Green accrued between July, 1864, and the following 10th of November. In the judgment of George W. Kirtland, is included a \$5,000 note, given to him by Kirtland & Co., while Catharine was a member of that firm. On the 6th of February, 1865, a few days prior to the confession of

this judgment, John Kirtland and George Kirtland, being then insolvent, took up this note, and gave for it, together with their own indebtedness to George W., a note for \$16,695, upon which judgment was entered February 13th, 1865. John Kirtland and George Kirtland being insolvent, had no right, as against their creditors, to assume the debts of other parties. The judgment of George W. Kirtland, so far as it includes the debt of the prior firm, should be postponed to the judgment of Wheeler and Green.

It is alleged that no execution has been issued upon the judgment of Andrew Henderson, and if this is true, it loses its priority over the judgment upon which execution has been issued, and levy thereunder made. The fact will be ascertained in the court below by reference to a master.

The result is, that the following order of priority should be decreed:

1. The \$4,000 mortgage to George W. Kirtland.
2. The mortgage of the life estate to George W. Kirtland, trustee, so far as it secures the claim of Jared T. Kirtland.
3. The judgment of George W. Kirtland, except so far as it secures the payment of the note given by Catharine Kirtland and George Kirtland, under the name of Kirtland & Co.; to that extent it must be postponed to Wheeler and Green's claim.
4. The judgment of Wheeler and Green.

The amount, if anything, due to Henderson, and his place, must be settled in the court below, upon the facts being ascertained. The decree appealed from, directs that Henderson have liberty to prove his judgment and assert his priority, if so disposed.

In my opinion, therefore, the case should be remitted, and the decree of the Chancellor modified, so as to conform to the views I have expressed.

The whole court concurred.¹

¹ In *Martin v. Bower*, 51 N. J. Eq. 452 (1893), held, the holder of an unrecorded equitable charge upon land, given for a full consideration moving at the date of its creation,

is entitled to priority over a subsequent legal mortgage given to secure a prior indebtedness. *Per PITNEY, V. C.*, citing the principal case.

SULLIVAN v. CORN EXCHANGE BANK

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND
DEPARTMENT, 1912

(154 App. Div. 292)

SEPARATE APPEALS by the defendants, Corn Exchange Bank and W. & J. Sloane, each from so much of an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 11th day of October, 1912, as grants judgment to the plaintiff on the pleadings against such appellant.

BURR, J. From an order granting plaintiff's motion for judgment on the pleadings this appeal comes.

The complaint alleges that on October 31, 1910, defendant Monahan was justly indebted to plaintiff in the sum of \$4,000, and as security for the payment of such indebtedness promised to execute his bond for that amount, bearing date on that day, secured by a mortgage on real property in Kings county. On the date named he did execute and deliver such a mortgage, but failed to execute and deliver the bond. The mortgage contained a recital that Monahan was indebted to plaintiff in the sum named, "secured to be paid by his certain bond or obligation, bearing even date herewith, conditioned for the payment of the said sum of" \$4,000. The grant of the land described in the mortgage was stated to be "for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, and also for and in consideration of one dollar." The mortgage contained an express covenant to "pay the indebtedness as hereinbefore provided." The mortgage was duly recorded January 27, 1911. Prior to the commencement of this action, which was on or about August 12, 1912, payment was demanded of the amount of such indebtedness, to wit, \$4,000, with interest from October 31, 1910. Upon default of payment this action was brought for a foreclosure of said mortgage. As incidental relief plaintiff demanded that "said mortgage be reformed by omitting therefrom the recital in (sic) the giving of said bond." Defendants Corn Exchange Bank and W. & J. Sloane,

each a domestic corporation, separately answered, denying none of the allegations of the complaint, but setting up, the Corn Exchange Bank that on the 10th day of January, 1911, it recovered a judgment against said Monahan in an action in the Supreme Court for \$8,157.36, which judgment was docketed in the office of the clerk of Kings county on January 11, 1911, and W. & J. Sloane that it also recovered a judgment against said Monahan on January 10, 1911, in an action in the Supreme Court for \$17,733.74, which judgment was also docketed in said clerk's office January 11, 1911. No attack is made upon the *bona fides* of said mortgage, nor do defendants contend that it was given in fraud of creditors. Plaintiff's motion for judgment on the pleadings was granted, and the question here is solely one of priority of lien.

The mortgage in question became and was from the date of its delivery a perfectly valid lien and incumbrance upon the premises therein described, as between the parties thereto. Even if it was given to secure payment of an antecedent debt, the same rule applies as between the parties and against all others who had at the time no equitable interest in the property, or who did not acquire rights as subsequent purchasers or incumbrancers for value. (1 Jones Mort. [3d ed.], § 458; *Young v. Guy*, 23 Hun, 1; aff'd., 87 N. Y. 457; *Obermeyer & Liebmann v. Jung*, 51 App. Div. 247.) The fact that no bond was actually given at the date of the execution and delivery of the mortgage does not impair it, since there was other sufficient consideration therefor. (1 Jones Mort. [3d ed.], § 353; *Goodhue v. Berrien*, 2 Sandf. Ch. 630; *Baldwin v. Raplee*, 4 Ben. 433.) Its validity does not depend upon the form of the indebtedness, whether by note, bond or otherwise, but upon the existence of the debt which it was given to secure. (*Goodhue v. Berrien*, *supra*; *Burger v. Hughes*, 5 Hun, 180; aff'd., 63 N. Y. 629.) This case is distinguishable from *Bergen v. Urbahn* (83 N. Y. 49, 51), where a bond was in fact given, which was not produced upon the trial, nor was any explanation offered for the failure to produce the same. The mortgage itself contains an express covenant to pay the debt, and the fact that no date is specified when it shall become payable does not render it unenforceable. Either the right to enforce it accrues immediately (*Purdy v. Philips*, 11 N. Y. 406; *Eaton v. Truesdail*, 40 Mich. 1; *Rhoads v. Reed*, 89 Penn. St. 436), or it may be enforced after the lapse of a reasonable time and upon demand. The complaint alleges demand, and if the rule of reasonable time does apply, it is for defendant to show that a lapse of nearly two years after delivery, without payment of either

interest on the debt or taxes or assessments upon the property, is not such reasonable time.

We think, therefore, that without reformation the mortgage was a valid and enforceable legal obligation on plaintiff's land, and as against defendants, judgment creditors of Monahan, a lien prior to the lien of such judgments, even though the mortgage was not recorded until after the judgments were docketed. The cases relied upon by appellants (*Ogden v. Ogden*, 180 Ill. 543; *Whiting Paper Co. v. Busse*, 95 Ill. App. 288; *Bramhall v. Flood*, 41 Conn. 68; *Porter v. Smith*, 13 Vt. 492) are clearly distinguishable. In the *Ogden* case it appeared that no actual indebtedness existed at the time of the delivery of the mortgage, nor until the delivery of the note recited therein, which was some six years subsequent to the date of the execution of the mortgage, and in the meantime the right of subsequent incumbrancers had intervened. In the case of *Whiting Paper Co.*, (*supra*), the original security had been surrendered, the *bona fides* of the debt was questioned, and the rights of subsequent incumbrancers had also intervened. In *Porter v. Smith*, (*supra*), where plaintiff held two promissory notes of defendant and it was agreed that two new notes should be given, secured by a mortgage, and the mortgage was drawn correctly describing said notes, but, by mistake, the new notes were retained by the debtor and the old notes returned to the creditor, the mortgagee, all that was held was that the mortgagee could not proceed at law in ejectment as he might otherwise have done, but must proceed in equity to enforce his claim. In *Bramhall v. Flood* (*supra*), the decision rested upon the peculiar provisions of the Recording Act of that State, which would seem to put judgment creditors upon a similar footing with purchasers and incumbrancers for value. (See *Pettibone v. Griswold*, 4 Conn. 158.) Our statute only provides that every conveyance (and for the purposes of the Recording Act a mortgage is within the definition of a conveyance) not recorded as therein required "is void as against any subsequent purchaser in good faith and for a valuable consideration, from the same vendor, his heirs or devisees, of the same real property or any portion thereof, whose conveyance is first duly recorded." (Real Prop. Law [Consol. Laws, chap. 50; Laws of 1909, chap. 52], § 291.) A judgment creditor is not such a purchaser, and an unrecorded conveyance has a preference over a judgment unless there is a superior equity in favor of the holder of the latter. (*Thomas v. Kelsey*, 30 Barb. 268; *Flagler v. Malloy*, 9 N. Y. Supp. 573; *Obermeyer & Liebmann v. Jung*, *supra*; *Russell v. Wales*, 119

App. Div. 536.) But if it could be successfully claimed that the instrument under consideration was so defective in form as to be invalid as a legal obligation, it might still be sustained as an equitable mortgage. "An equitable mortgage may also be constituted by any writing from which the intention may be gathered; and an attempt to make a legal mortgage, which fails for want of some solemnity, is valid in equity." (Miller Eq. Mort. 1; *Payne v. Wilson*, 74 N. Y. 348; *Perry v. Board of Missions, etc., of Albany*, 102 *id.* 99; *Hamilton Trust Co. v. Clemes*, 163 *id.* 423; *Hughes v. Edwards*, 9 Wheat. 489; *Flagg v. Mann*, 2 Sumn. 486.) It is not necessary to bring an action to reform an equitable mortgage so as to make it a legal obligation in order to enforce it. (*Sprague v. Cochran*, 144 N. Y. 104.) An equitable mortgage takes precedence over a lien, whether general or special, which only attaches, as does a judgment, to such right, title or interest as the debtor has in real property. (*Matter of Howe*, 1 Paige, 125; *Keirsted v. Avery*, 4 *id.* 9; *Dwight v. Newell*, 3 N. Y. 185; *Chase v. Peck*, 21 *id.* 581; *Robinson v. Williams*, 22 *id.* 380; *Payne v. Wilson*, *supra.*) If this controversy had arisen between purchasers or incumbrancers of the property in question, the fact that the mortgage was given to secure an antecedent debt might have been a factor of consequence, since in such case, in the absence of an enforceable agreement to extend the time for the payment of the debt, plaintiff might not be deemed a purchaser for value within the meaning of the Recording Act. (Real Prop. Law, *supra*, § 291; *O'Brien v. Fleckenstein*, 180 N. Y. 350.) But in the case of a judgment creditor who can claim no benefit under the provisions of the said act, if the mortgage was valid between the parties we can see no reason for any distinction in the absence of some superior or at least equal equity. The only authority which we have been able to find directly to the contrary is the case of *Wheeler v. Kirtland* (24 N. J. Eq. 552). The statement in the opinion to that effect cites no authority in support of it, and it seems to us to be directly contrary to the authorities in this State to which reference has been made. In this case no superior equity is shown on the part of the judgment creditors. It does not appear that the debts were even in existence at the time when the mortgage in suit was given, or that they extended credit to the mortgagor upon his supposed ownership of the premises in question, free from the lien of said mortgage. If plaintiff's equitable lien had arisen subsequent to the docketing of the judgment or simultaneously therewith, a different question would have been presented (*Dwight v. Newell*,

supra; *Goodhue v. Berrien*, *supra*), but upon the facts here disclosed the order appealed from was correctly made, and it should be affirmed.

HIRSCHBERG, THOMAS, CARR and WOODWARD, JJ., concurred.

In each case order affirmed, with ten dollars costs and disbursements.¹

CURTIS v. MOORE

COURT OF APPEALS OF NEW YORK, 1897

(152 N. Y. 159)

APPEAL from a judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered December 5, 1894, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

VANN, J. On the nineteenth of October, 1885, Edward S. Curtis conveyed an undivided one-sixth interest in certain premises situate in the city of New York to John B. Armstrong by a deed dated that day and duly recorded October 26, 1885. At the same time the said Armstrong executed a purchase-money mortgage to Edward S. Curtis to secure a note for \$2,000, given by the former to the order of the latter, of even date with the mortgage, and payable two years thereafter with interest at six per cent. This mortgage was duly recorded November 24th, 1885. March 29th, 1886, said Edward S. Curtis borrowed the sum of \$500 of the plaintiff, and delivered to him the said note and mortgage and gave him an instrument of which the following is a copy:

"500.

Chicago, Ill., Mar. 29, 1886.

"One day after date, for value received, I promise to pay to the order of De Witt H. Curtis the sum of five hundred dollars, at Chicago, with interest at the rate of 8 per cent per annum after date, having deposited with said D. H. Curtis, as collateral security, a certain real estate mortgage for the sum of two thousand dollars, bearing date of 19th October, 1885, given to E. S. Curtis by J. R. Armstrong & Desiree D., his wife, which I hereby give the said D. H. Curtis, agent or assignee, authority to sell, or any part

¹*Obermeyer & Liebmann v. Jung*, 51 Cal. 193 (1874); *Rogers v. Abbott*, App. Div. (N. Y.) 247 (1900), *accord.* 128 Mass. 102 (1890).
And see *Wilcoxon v. Miller*, 49

thereof, on the maturity of this note, or at any time thereafter, or before, in the event of said securities depreciating in value in the opinion of said D. H. Curtis, at public or private sale, at the discretion of said D. H. Curtis or his assignee, without advertising the same, or demanding payment, or giving me any notice, and to apply so much of the proceeds thereof to the payment of this note as may be necessary to pay the same, with all interest due thereon, and also to the payment of all expenses attending the sale of the said mortgage, including attorney's fees, and in case the proceeds of the sale of the said mortgage shall not cover the principal, interest and expenses, I promise to pay the deficiency forthwith after such sale.

"EDWARD S. CURTIS."

On May 20th, 1886, Edward S. Curtis borrowed from the plaintiff \$500, on the same security as collateral, and on August 25th in the same year, he borrowed \$500 more, each time giving him an instrument similar in form to that of March 29, 1886, but none of them were acknowledged or recorded. February 7, 1887, said Armstrong conveyed the premises covered by the mortgage to Edward S. Curtis by deed duly recorded on the 5th of March, following. On the 23d of February, 1891, Edward S. Curtis, for a valuable consideration, conveyed the premises to the defendant J. Charles Moore, by deed duly recorded on the 11th of April thereafter.

This action was brought to foreclose said mortgage, and the defendant Moore alleges in defense that he is a *bona fide* purchaser of the premises in question without notice, and that the conveyance from Armstrong to Edward S. Curtis effected a merger of the mortgage. Upon the trial it did not appear that Mr. Moore purchased the premises either with or without actual knowledge of the outstanding mortgage and note given by Mr. Armstrong and transferred to the plaintiff. He is presumed, however, to have had notice of such facts, as an examination of the record would have disclosed.

Under the circumstances above stated, the plaintiff became the owner of the mortgage for the purpose for which it was delivered or pledged to him, as "a good assignment of a mortgage is made by delivery only." (*Fryer v. Rockefeller*, 63 N. Y. 268-276; *Runyan v. Mersereau*, 11 Johns. 534; *Green v. Hart*, 1 Johns. 586.) If the omission of the plaintiff to record the evidence of the transfer of the mortgage to him inured to the benefit of the defendant under

the Recording Act, we may assume that the latter became a *bona fide* purchaser without notice, otherwise not. In *Purdy v. Huntington* (42 N. Y. 334) the question was directly passed upon by this court and decided adversely to the contention of the defendant. It was held in that case that the assignee of a recorded mortgage upon real estate, which was conveyed by the mortgagor to the mortgagee after an assignment of the mortgage, has a valid lien as against a purchaser from the mortgagee who took without notice of the assignment, notwithstanding the conveyance to the mortgagee, as well as the conveyance from the mortgagee to the purchaser, were recorded before the assignment was placed upon record. The court said: "The question is then presented, whether Calvin Huntington can be protected in his title as against the mortgage by reason of the omission to have the assignment thereof recorded. It is conceded that he is to be charged with constructive notice of the existence of the mortgage, and of the continuance of its lien, by its record in the proper office. By that he was informed not only of the date of the mortgage, the amount secured thereby, and of all its particulars, but that it was open and uncanceled of record, and therefore apparently an outstanding lien and incumbrance on the premises of which he was taking title. Having that information, he knew or was at least chargeable in law with the further notice, that it was such lien and incumbrance in the hands of any person to whom it had been legally transferred, and that the record of such transfer was not necessary to its validity, nor as a protection against a purchaser of the property mortgaged or any other person that a subsequent purchaser in good faith of the mortgage itself or the bond or debt secured thereby; but on the contrary, that a vendee of the premises took it subject to the lien of the mortgage irrespective of the ownership thereof. That knowledge and notice made it his duty in the exercise of proper diligence to inquire whether Minott Mitchell, his vendor, was still the owner and holder of the mortgage, and his omission to make that inquiry deprives him of the protection of a *bona fide* purchaser." (Citing *Brown v. Blydenburgh*, 7 N. Y. 141; *Kellogg v. Smith*, 26 N. Y. 18; *Gillig v. Maass*, 28 N. Y. 191; *Campbell v. Vedder*, 3 Keyes, 174.) The same principle was laid down in an earlier case, where the court said: "The failure to record an assignment of the prior mortgage could not blot out the record of the mortgage itself. If Van Vranken was the purchaser, in good faith, of the prior mortgage, and an assignment thereof, previously made, had not been recorded, he would hold the mortgage. But, if he only became the

purchaser of the premises by absolute deed, or otherwise, the record of a prior mortgage is sufficient notice thereof to him, no matter how often assigned, or whether the assignment be recorded or not. The only alteration made by the Recording Act of 1830 is, that an assignment must now be recorded as against a subsequent *bona fide* purchaser of the mortgage assigned. A 'subsequent purchaser in good faith,' in the Recording Act, as to this case, means a purchaser of the mortgage assigned, not a purchaser of the premises. A subsequent purchaser of the premises is bound by a prior recorded mortgage, no matter who holds it." (*Campbell v. Vedder*, 1 Abb. Ct. of App. Dec. 295, 302; s. c., 3 Keyes, 174.)

It is obvious that these cases are analogous to the case before us. Mr. Moore was not a *bona fide* purchaser within the principle established by those authorities, because the record of the mortgage was notice to him that the mortgage was outstanding and unsatisfied, and it was no concern of his who happened to be the owner at the time. In dealing with the property on the assumption that Edward S. Curtis still owned the mortgage, he acted at his peril and assumed the risk that Curtis might have transferred the mortgage to someone else. He was put upon his inquiry, and it was not enough for him to examine the record and see that no assignment of the mortgage appeared thereon, but he should have required a satisfaction piece in due form or the delivery of the mortgage and note.

The case of *Bacon v. Van Schoonhoven* (87 N. Y. 446) is not in conflict with the cases cited above. In that case the mortgagee advanced money in reliance upon a satisfaction piece executed by the mortgagee in a former mortgage, which had been duly recorded and in fact had been assigned, but the assignment was not recorded. The court held that the satisfaction piece was a conveyance within the meaning of the Recording Act, and that whoever advanced money to be secured by a bond and mortgage upon the faith of such an instrument was a *bona fide* purchaser within the provisions of the act. This was the question before the court, and all that was decided that bears upon the subject now before us, although language somewhat broader in its application was used in the opinion. Although both *Purdy v. Huntington* and *Campbell v. Vedder* were cited by counsel upon the argument, neither is referred to in the opinion, and it is clear that the court did not intend to overrule them. If Edward S. Curtis had given a satisfaction piece of the mortgage standing on the record in his name, the case relied upon by the defendant would be applicable.

He did not do this, however, but accepted title with constructive notice of an uncanceled mortgage, recorded and outstanding, without making inquiry or requiring the production of the mortgage itself, or the note that it was given to secure. Under these circumstances, he cannot be held a *bona fide* purchaser as against the mortgage assigned to the plaintiff, because it is not necessary to record an assignment of a recorded mortgage as against a subsequent purchaser of the mortgaged premises, but only as against a subsequent purchaser of the mortgage itself. (*Purdy v. Huntington, supra; Campbell v. Vedder, supra; Miller v. Lindsey*, 19 Hun, 207.)

There was no merger because the ownership of the mortgage, with the debt secured thereby, and the title to the land, did not meet in the same person. When the fee came back to Edward S. Curtis he had no title to the mortgage, for he had assigned it some months before. There can be no merger, at law, without a union of titles in the same person; nor, in equity, unless, also, there is an intention on the part of those concerned in the transaction that it should operate as a merger. In this case both the union and intention were wanting. (*Purdy v. Huntington, supra; Smith v. Roberts*, 91 N. Y. 470; *Sheldon v. Edwards*, 35 N. Y. 279, 284; *Bascom v. Smith*, 34 N. Y. 320.)

The defendant offered to show an agreement between said Armstrong and Edward S. Curtis, bearing the same date as the mortgage, which recited the conveyance of the property by Curtis to Armstrong, and provided for its reconveyance by Armstrong to Curtis. It contained a stipulation that Armstrong "has no beneficial interest in the above-described property, but holds it subject to a trust." This agreement was immaterial, and was properly excluded on that account. The plaintiff knew nothing of it and was not a party to it. Armstrong's title came from Curtis, and the plaintiff could not be affected by a secret agreement between them that the former should hold the premises in trust for the latter, when, according to the record, he held it in fee at the time the mortgage was executed, and the mortgage contained the recital that it was given to secure the payment of a part of the purchase money. Moreover, the plaintiff has the interest of both the trustee and the *cestui que trust*, for the one executed while the other assigned the mortgage.

After examining all of the exceptions, we think the judgment was right and that it should be affirmed, with costs.

All concur.¹

¹ *Purdy v. Huntington*, 42 N. Y. 344 (1870), *accord*.

ABBOTT v. FROST

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1904

(185 Mass. 398)

BILL IN EQUITY, filed August 12, 1903, by the purchaser at a foreclosure sale under a mortgage of certain real estate in that part of Framingham called South Framingham, and by the mortgagee, to remove a cloud on the title of the first named plaintiff by setting aside a tax sale to the defendant alleged to be invalid.

BRADLEY, J.¹ At the time these taxes were assessed and when the sale took place, St. of 1888, c. 390, § 30, as amended by St. of 1889, c. 334, § 9, provided that ". . . If such tax remains unpaid for fourteen days after demand therefor, it may with all incidental charges and fees be levied by sale of the real estate within said two years, or after the expiration of said two years, if the estate has not been alienated prior to the giving of the notice of such sale."

When a sale of real property under this and similar statutes is made for taxes lawfully assessed, the entire title or interest in the land passes to the grantee by the deed of the collector, and it does not become essential to inquire whether his title is to be considered as the result of all previous titles and which are transmitted to him by operation of law, or a new title conferred under a taking by the sovereign power to enforce a public right to which property under our constitution is generally made subject. See *Harrison v. Dolan*, 172 Mass. 395, 398; *Emery v. Boston Terminal Co.*, 178 Mass. 172, 184.

Such a lien constitutes a charge or incumbrance on the land without which it could not be sold, and at any time within the limitation a sale or conveyance would vest in the purchaser an absolute title to the whole estate freed from the mortgage which was in existence, and all outstanding incumbrances. *Hunt v. Boston*, 183 Mass. 303, 305, and cases cited. . . .

¹ Portion of opinion omitted.

ERIE COUNTY SAVINGS BANK *v.* SCHUSTER

COURT OF APPEALS OF NEW YORK, 1907

(187 N. Y. 111)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 12, 1905, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at an Equity Term and directing a dismissal of the complaint as to the respondents herein.

O'BRIEN, J. This was an action for the foreclosure of a mortgage. Several persons were made defendants who have not appeared and judgment went against them by default. The defendants, the Schusters, however, appeared and answered, and the question involved in the case arises between these defendants and the plaintiff. The complaint contains the usual allegations in foreclosure cases. It alleges that the Schusters were in possession of the premises and claimed under some right or title inferior and subordinate to the lien of the mortgage and the usual relief in foreclosure cases was demanded against them, that is, that they be barred and foreclosed from all right, title and interest in the mortgaged premises. The Schusters, in their several answers, denied the allegation of the complaint that they claimed under a title subordinate to the lien of the mortgage, and they alleged that they were in possession under a deed executed by the proper authorities upon a sale of the land for taxes that were levied subsequently to the mortgage in question.

At the opening of the trial the answering defendants requested the court to dismiss the complaint as to them, since it appeared from the pleadings that they claimed under a title paramount to the lien of the plaintiff's mortgage. The court denied their motion and proceeded to take proof as to the nature of the defendants' claim of title. When the proofs were closed it appeared that the lands covered by the mortgage had been sold for taxes levied subsequent to the execution of the mortgage, and that they were bid in by the state and were afterwards sold by the commissioners of the land office to the defendants. The defendants again requested the court to dismiss the complaint as to them, since it now appeared that their title was paramount to that of the plaintiff. The motion was denied and the defendants excepted. The trial court

found the facts here stated and other facts as to the execution of the plaintiff's mortgage and the amount due thereon, and he directed that the defendants, including the Schusters, should be forever barred and foreclosed from any right, title and interest in the property. There was an exception to this finding.

The answering defendants appealed from the judgment to the Appellate Division and the decision of the trial court was there reversed and the complaint dismissed as to them and the plaintiff has appealed to this court. We think that the judgment is correct. The appeal of the plaintiff presents but two questions of law, and in the opinion of the learned court below these questions are fully discussed and the conclusion is fully sustained by the cases in this state.¹ Both questions are quite familiar, and it is unnecessary to refer to the authorities upon which the conclusion is based. There can be no doubt that a title resting upon a sale of land for taxes regularly conducted is paramount to the lien of a prior mortgage. The owner of such a mortgage has the statutory right of redemption upon giving notice to the public authorities as to his right and title, but it is unnecessary to discuss the proceedings to be followed in such a case, since it is not claimed that the plaintiff complied with the statute or is in an attitude seeking to redeem. The plaintiff simply insists that the lien of its mortgage is prior and superior to the title acquired by the tax sale. Upon that proposition the plaintiff rests its whole contention, and its position in this respect is obviously untenable.

It is equally clear that the defendants in this case, who were in possession under the tax title, were not proper parties to the action. Their title and possession cannot be assailed in an action to foreclose a mortgage, since they are entitled to defend their claim in a court of law in the usual way in which actions for the recovery of real property are tried. The defendants cannot be required to defend their title in an equitable action like this, but are entitled to have their rights passed upon by a jury in a court of law. It follows that the defendants had the right to object to have their title tried in this action, since it was not upon its face subordinate to the lien of the mortgage.

The judgment appealed from is right and should be affirmed, with costs.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WERNER and CHASE, JJ., concur; HISCOCK, J., not sitting.

¹ See 107 App. Div. (N. Y.) 46.

NEW YORK REAL PROP. LAW, § 290. (1) The term "real property," as used in this article, includes lands, tenements and hereditaments and chattels real, except a lease for a term not exceeding three years. (2) The term "purchaser" includes every person to whom any estate or interest in real property is conveyed for a valuable consideration, and every assignee of a mortgage, lease or other conditional estate. (3) The term "conveyance" includes every written instrument, by which any estate or interest in real property is created, transferred, mortgaged or assigned, or by which the title to any real property may be affected, including an instrument in execution of a power, although the power be one of revocation only, and an instrument postponing or subordinating a mortgage lien; except a will, a lease for a term not exceeding three years, an executory contract for the sale or purchase of lands, and an instrument containing a power to convey real property as the agent or attorney for the owner of such property. (4) The term "recording officer" means the county clerk of the county, except in the counties of New York, Kings or Westchester, where it means the register of the county.

§ 291. A conveyance of real property, within the state, on being duly acknowledged by the person executing the same, or proved as required by this chapter, and such acknowledgment or proof duly certified when required by this chapter, may be recorded in the office of the clerk of the county where such real property is situated, and such county clerk shall, upon the request of any party, on tender of the lawful fees therefor, record the same in his said office. Every such conveyance not so recorded is void as against any subsequent purchaser in good faith and for a valuable consideration, from the same vendor, his heirs or devisees, of the same real property or any portion thereof, whose conveyance is first duly recorded.

§ 315. Different sets of books must be provided by the recording officer of each county, for the recording of deeds and mortgages; in one of which sets he must record all conveyances and other instruments absolute in their terms delivered to him, pursuant to law, to be so recorded, which are not intended as mortgages, or securities in the nature of mortgages, and in the other set, such mortgages and securities delivered to him.

§ 316. Each recording officer must provide, at the expense of his county, proper books for making general indexes of instruments recorded in his office, and must form indexes therein, so as to afford correct and easy reference to the books of record in his office.

There must be one set of indexes for mortgages or securities in the nature of mortgages, and another set for conveyances and other instruments not intended as such mortgages or securities. Each set must contain two lists in alphabetical order, one consisting of the names of the grantors or mortgagors, followed by the names of their grantees or mortgagees, and the other list consisting of the names of the grantees or mortgagees, followed by the names of their grantors or mortgagors, with proper blanks in each class of names, for subsequent entries, which entries must be made as instruments are delivered for record. . . .

UNITED STATES FIDELITY & GUARANTY CO. v. UNITED STATES & MEXICAN TRUST CO.

CIRCUIT COURT OF APPEALS OF THE UNITED STATES, EIGHTH CIRCUIT, 1916

(234 Fed. 238)

APPEAL from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Bill by the United States & Mexican Trust Company and others against the Kansas City, Mexico & Orient Railroad Company and others to foreclose a mortgage, in which the United States Fidelity & Guaranty Company intervenes. From a decree of foreclosure, allowing the claim of the intervener as a general demand, but denying it as an equitable preference over the holders of bonds secured by the mortgage, the intervener appeals.

Affirmed.

Before SANBORN and SMITH, Circuit Judges, and REED, District Judge.

SANBORN, Circuit Judge. This is an appeal by the United States Fidelity & Guaranty Company, surety on a supersedeas bond of the Kansas City, Mexico & Orient Railroad Company, from a decree of the District Court allowing its claim in proceedings to foreclose the prior mortgage on the property of the Railroad Company as a general demand, but denying it an equitable preference over the holders of the bonds secured by the mortgage. The mortgage securing the bonds covered the property, the after-acquired property, and the income of the Railroad Company. It was made and recorded about February 1, 1901. On December 6, 1912, in the suit to foreclose the mortgage, a prior receivership of the property of the

Railroad Company was extended over the foreclosure suit. A decree of foreclosure was rendered on February 2, 1914, in which the court adjudged that the mortgage was a first lien upon the property and income of the Railroad Company to secure the payment of bonds issued thereunder to the amount of \$24,538,000, and that the property be sold, and it was subsequently sold under the decree for \$6,001,000 in this foreclosure suit. The Fidelity Company intervened, and prayed that the court would order its claim to be paid out of the proceeds of the sale of the property in preference to the claims of the bondholders secured by the mortgage.

Its claim arose in this way: One Madison, on June 19, 1911, recovered a judgment in one of the district courts of Kansas against the Railway Company, on account of a personal injury caused by the negligence of servants of the company, for \$9,000 and costs, from which the Railway Company appealed. At the request of the Railway Company the Fidelity Company made and filed a supersedeas bond to stay the collection of the judgment, the judgment was subsequently affirmed, and the Fidelity Company paid the penalty of the bond, \$10,247.05.

The first reason presented to this court for the reversal of the decree below is that the court failed to investigate, fix, and enforce the liability of the stockholders of the Railway Company to pay for their stock and to apply the payments that should thus be collected to a liquidation of the mortgage bonds. But the Fidelity Company presents this ground for relief for the first time in this court without pleading it in its intervening petition, or introducing any evidence below to sustain it, and without giving the trustee of the bondholders any notice of such a claim, or any opportunity to challenge it, or to produce evidence to defeat it in the court below. It is clearly too late to urge this contention for the first time now, and the consideration or maintenance of it by this court under these circumstances would be unjust and inequitable.

The second argument is that the judgment in Madison's personal injury suit was rendered on June 19, 1911; that at that time and when the supersedeas bond was given the Railway Company was in default in the payment of its interest on its bonds, and was insolvent; that the Fidelity Company had no knowledge of these facts; that if it had known them it would not have signed the bond, but that the holders of the bonds and coupons neither foreclosed their mortgage nor gave any notice of the financial conditions of the Railway Company to the Fidelity Company before it made its

bond; and that in view of these facts they are estopped from maintaining the superior lien of their prior mortgage. The proof, however, leaves no doubt that there had been no default in the payment of the interest on the bonds when the supersedeas bond was given. All the coupons which were due, and which had been presented at their respective places of payment, had been paid. A small percentage of the bondholders had not yet presented their overdue coupons, and those were still unpaid. Nor would the facts, if they had existed, that the Railway Company was insolvent, that the bondholders knew of this insolvency and the Fidelity Company did not, that the bondholders did not inform that company of the insolvency, and that the Fidelity Company would not have made the bond if it had been aware of the insolvency, have estopped the bondholders from enforcing the superiority of their mortgage lien. If their lien had been a secret one, there might have been some basis for a claim of an estoppel; but their mortgage was of record, and had been of record for about 10 years, and that record, under the law which made it a public record, was a flaming signal of danger that charged the Fidelity Company and all others dealing with the Railway Company with full knowledge of the terms and legal effect of the mortgage and of the bonds it secured. After the bondholders had recorded their mortgage no duty rested upon them to notify the Fidelity Company, or any other party dealing with the Railway Company, of any default in the payment of their bonds or coupons, or of any insolvency or solvency of the Railway Company. They had secured themselves against the risk of the insolvency of the Company by their mortgage, and by its record they had given all men legal notice of that fact, and of the further fact that every party who thereafter dealt with the company took its own risk of the insolvency of that company and of its inability to pay any debt or discharge any obligation it contracted in the face of the record notice of the prior and superior lien of the mortgage. The bondholders were not estopped from enforcing their superior lien by the facts or the alleged facts of this case.

It is next insisted that the Fidelity Company is entitled in equity to a preference over the holders of the bonds, because its bond preserved and enhanced the value of the property to the bondholders secured by the mortgage. But the fact that liabilities or guaranties incurred, money or materials furnished, or work done at the request of the mortgagor preserve the mortgaged property and enhance the security of the mortgagees, is no ground for dis-

placing the prior lien of the mortgagees for the reason that the record of the mortgage is plenary notice that such acts will ordinarily and naturally have that effect, and will subject the enhanced value to the superior lien of the recorded mortgage. *Dunham v. Railway Company*, 1 Wall. 254, 267, 17 L. Ed. 584; *Railroad Co. v. Cowdrey*, 11 Wall. 459, 464, 481, 482, 20 L. Ed. 199; *Railway Co. v. Hamilton*, 134 U. S. 296, 301, 10 Sup. Ct. 546, 33 L. Ed. 905; *Porter v. Pittsburgh Bessemer Steel Co.*, 120 U. S. 649, 671, 7 Sup. Ct. 1206, 30 L. Ed. 830; *Thompson v. Valley R. R. Co.*, 132 U. S. 68, 73, 74, 10 Sup. Ct. 29, 33 L. Ed. 256; *Morgan's Co. v. Texas Central Ry.*, 137 U. S. 171, 195, 11 Sup. Ct. 61, 34 L. Ed. 625; *Southern Railway v. Carnegie Steel Co.*, 176 U. S. 257, 259, 296, 20 Sup. Ct. 347, 44 L. Ed. 458; *Lackawanna, etc., Co. v. Farmers' Loan & Trust Co.*, 176 U. S. 298, 315, 316, 20 Sup. Ct. 363, 40 L. Ed. 475; *Illinois Trust & Sav. Bank v. Doud*, 105 Fed. 123, 124, 136, 44 C. C. A. 389, 390, 402, 52 L. R. A. 481; *International Trust Co. v. T. B. Townsend, etc., Co.*, 95 Fed. 850, 863, 37 C. C. A. 396, 409. The dominant rule that runs through and controls this case, and all other cases upon this subject, is thus stated by the Supreme Court in *Dunham v. Railway Company*, 1 Wall. 254, 267, 17 L. Ed. 584:

"Contractor, under the circumstances, could acquire no greater interest in the road than was held by the company. He did not exact any formal conveyance; but, if he had, and one had been executed and delivered, the rule would be the same. Registry of the first mortgage was notice to all the world of the lien of the complainant, and in that point of view the case does not even show a hardship upon the contractor, as he must have known, when he accepted the agreement, that he took the road subject to the rights of the bondholders. Acting, as he did, with a full knowledge of all the circumstances, he has no right to complain if his agreement is less remunerative than it would have been if the bondholders had joined with the company in making the contract. No effort appears to have been made to induce them to become a party to the agreement, and it is now too late to remedy the oversight."

Finally counsel argued that the fact that the Fidelity Company gave a supersedeas bond and thereby prevented Madison from levying an execution on the property of the Railway Company, and thereby interrupting the running of the railroad, entitles it to an equitable preference over the bondholders secured by the prior mortgage, and in support of this position a consideration of these authorities is invoked. *Union Trust Co. v. Morrison*, 125 U. S. 591,

8 Sup. Ct. 1004, 31 L. Ed. 825; *Farmers' Loan & Trust Co. v. Northern Pacific R. Co.* (C. C.), 71 Fed. 245; *Jones v. Central Trust Co.*, 73 Fed. 568, 571, 19 C. C. A. 569; *City Trust Co. v. Sedalia Light & Traction Co.* (D. C.), 195 Fed. 845, 849. An examination of these cases discloses little support for the position of the appellant. The opinion and decision in *City Trust Co. v. Sedalia Light & Traction Co.* (D. C.), 195 Fed. 845, 849, sustains that position. But that opinion and decision was rendered by Judge Pollock, the same judge whose decision in the case in hand that the surety on this supersedeas bond is not entitled to an equitable preference over the bondholders secured by the mortgage is now in issue, and his opinion in the case in 195 Fed. 845, was contrary to the opinion of Judge Brewer, afterwards Mr. Justice Brewer of the Supreme Court, in *Blair, Trustee, v. St. Louis, H. & K. R. Co.* (C. C.), 23 Fed. 523, which was rendered in 1885 and has been the prevailing rule in this circuit from that time to the present. As Judge Pollock has come to a different conclusion in the case before us, his decision in 195 Fed. 845, is entitled to no farther consideration. All the other authorities quoted above were rendered before that long and notable line of decisions of the Supreme Court commencing with *Kneeland v. American Loan Co.*, 136 U. S. 89, 98, 10 Sup. Ct. 950, 34 L. Ed. 379, and including *Morgan's L. & T. R. Co. v. Texas Central Ry. Co.*, 137 U. S. 171, 196, 198, 11 Sup. Ct. 61, 34 L. Ed. 625; *Thompson v. Valley R. Co.*, 132 U. S. 68, 71, 73, 10 Sup. Ct. 29, 33 L. Ed. 256; *Thomas v. Western Car Co.*, 149 U. S. 95, 110, 13 Sup. Ct. 824, 37 L. Ed. 663; *Southern Railway Co. v. Carnegie Steel Co.*, 176 U. S. 257, 296, 20 Sup. Ct. 347, 44 L. Ed. 458; *Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co.*, 176 U. S. 298, 315, 20 Sup. Ct. 368, 40 L. Ed. 475, and later cases of the same nature, narrowed and limited the class of cases entitled to an equitable preference over prior mortgages to those incurred for the necessary current expenses of the operation of the mortgaged property in the ordinary course of business within a limited time anterior to the impounding of the property by the receiver for the benefit of the mortgagees. The influence and authority of these earlier decisions is far less than those of the modern opinions which conform to the rule established by the later authorities from the Supreme Court.

The opinion and decision in *Union Trust Company v. Morrison*, 125 U. S. 591, 8 Sup. Ct. 1004, 31 L. Ed. 825, when carefully read, fails, as was demonstrated by Judge Lurton, afterwards Mr. Justice Lurton of the Supreme Court, in *Whiteley v. Central Trust*

Co., 76 Fed. 74, 77, 22 C. C. A. 67, 34 L. R. A. 303, to sustain the proposition that a surety who, at the request of the mortgagor, signs a supersedeas or other bond in reliance upon the solvency of the mortgagor, and in the belief and expectation that it will pay any loss the surety sustains out of its income or property, is entitled to any preference in equity over the bonds secured by the prior mortgage. It was not based upon that proposition but was founded on special equities which do not exist in this case, or in any ordinary case involving an alleged preferential equity of a surety upon a supersedeas bond.

Nor does the decision and opinion of the court in *Jones v. Central Trust Company*, 73 Fed. 568, 19 C. C. A. 569, sustain the contention of the surety. In that case an attachment had been levied upon some mortgaged property. Thereupon the trustee in the mortgages caused the property to be replevied, and brought the sureties to sign the replevin bonds. Because the trustee induced and caused the sureties to make the bonds, the court held that the sureties were entitled to an equitable preference over the trustee and over the bondholders he represented in payment out of the mortgaged property. The case rests upon the fact that the trustee for the bondholders induced the sureties to sign. 73 Fed. 571, 573, 19 C. C. A. 569. Neither the trustee nor any of the bondholders solicited or caused the Fidelity Company to sign the bond in the case at bar.

Of the cases cited by counsel for the surety there remains *Farmers' Loan & Trust Co. v. Northern Pacific R. Co.* (C. C.), 71 Fed. 245. In that case Griggs and Foster had signed a supersedeas bond to stay the execution of a judgment against the Northern Pacific Railroad Company for a personal injury. The appeal was dismissed, and the judgment became final, after receivers of the property of the Railroad Company had been appointed. At that time there was a rivalry between the judge of the Eastern district of Wisconsin, the court of original jurisdiction, and the judge of the district of Washington, one of the courts of ancillary jurisdiction, over the administration of the property of this railroad. Judge Caldwell had delivered his opinion in *Farmers' Loan & Trust Co. v. Kansas City, W. N. W. Ry. Co.* (C. C.), 53 Fed. 182, in which he had in effect held that any meritorious claims of unsecured creditors might, in the discretion of the judge administering the property, be given a preference in payment out of the income, or out of the proceeds, of mortgaged property over the claims of bondholders secured by a prior mortgage. The Supreme Court,

not without knowledge of that opinion, had expressly held, and rather sternly insisted upon, the established contrary rule in *Kneeland v. American Loan Co.*, 136 U. S. 89, 97, 10 Sup. Ct. 950, 953 (34 L. Ed. 379), and had said:

"The appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when the court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens."

In this state of the decisions the receivers applied to Judge Jenkins in the Wisconsin district for authority to pay the claim against the sureties on the supersedeas bond out of the income of the property in their hands in preference to the claims of the mortgage bondholders. Judge Jenkins reviewed the decision of Judge Caldwell and that of the Supreme Court in *Kneeland v. Loan Co.*, 136 U. S. 97, 10 Sup. Ct. 950, 34 L. Ed. 379, held that the decision

of Judge Caldwell was "in direct antagonism to the rulings of the Supreme Court," that he could not follow it, and denied the petition of the receivers. *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.* (C. C.), 68 Fed. 36, 39. Thereupon the sureties, Griggs and Foster, applied to the District Court of Washington in the same foreclosure suit, for preferential payment of the same claim, and Judge Hanford, although he was aware of Judge Jenkins' decision to the contrary (71 Fed. 246), referred to Judge Caldwell's opinion in 53 Fed. 182, 196, said:

"It is my opinion that Judge Caldwell's opinion in that case is sound, and that the principles therein enunciated must prevail as the law of this country, and I have no hesitation in following that case in this instance." *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.* (C. C.), 71 Fed. 245, 246, 248.

On the authority of Judge Caldwell's decision he gave the claim of the sureties a preference in payment over the claims of the mortgage bondholders, notwithstanding the decisions of the Supreme Court. This decision of Judge Hanford is the only decision cited by counsel for the Fidelity Company which is in point upon the issue in the case in hand. It lacks the support of reason and of authority, and the argument in it is not persuasive.

There is no equity in the claim of this surety to be preferred in payment out of the mortgaged property to the holders of the bonds. The mortgage was made and recorded a decade before the surety signed its bond. That mortgage was made and recorded for the express purpose of giving to the bondholders secured thereby a first lien upon the mortgaged property and a preference in payment out of the income and out of the proceeds of the property mortgaged. Such a preference was secured by the express terms of the contract made between the mortgagor, the trustee and the bondholders. Probably some of the bonds had been repeatedly sold between the time when they were issued and the date when the supersedeas bond was given. The purchasers bought them in reliance upon the first lien upon the property of the railway company evidenced by the recorded mortgage. They had no notice or knowledge that the Fidelity Company was acquiring or seeking to acquire a lien superior to their own. The Fidelity Company gave them no notice of its attempt so to do, and no opportunity to protect or defend themselves against it until, if its preferential lien exists at all, it has become perfect. On the other hand, the Fidelity Company, before and at the time it assumed its liability, had full knowledge by the record of the mortgage, first, that the bond-

holders had a first lien upon the mortgaged property; second, that the only parties that could waive that lien, or make a lawful contract to give another superior to it, were the trustee and the bondholders, and that the mortgagor was powerless to do so. Notwithstanding this knowledge the Fidelity Company neither sought nor secured any contract from the trustee or the bondholders. In the face of all this knowledge, it voluntarily signed the supersedeas bond and assumed its liability in reliance upon and at the risk of the ability of the mortgagor to protect and indemnify it, and it cannot now successfully appeal to a court of equity to throw that risk and the burden thereof upon the mortgage bondholders. Its equity is far inferior to theirs.

The contention that by means of the bond property was preserved, and the assets that came to the hands of the bondholders were increased by the amount of the judgment which the bond prevented the judgment creditor from collecting, is fallacious. The judgment was inferior in lien to the mortgage, and nothing which was subject to the mortgage could have been taken from the bondholders by a levy and sale under the judgment. If the execution would have been levied upon property upon which the bondholders had no lien, the taking of that property would not have diminished their security, and if it would have been levied upon property subject to their lien, their mortgage would have held that property. And even if it were true that the surety, by its bond to pay the judgment, preserved security or property which subsequently came to the bondholders, and which they otherwise would have lost, that fact would not give the surety a preferential equity over the bondholders. If it would, then every unsecured creditor, whose moneys, labor, material, or guaranty aided to preserve or enhance the value of the mortgaged property, might, by delaying collection of the mortgagor's debts, secure an equitable lien superior to that of the mortgage, and every creditor, whose claim, like that of Madison here, neither preserved nor enhanced the value of the mortgaged property, could give that claim a preferential lien by hiring some surety company for a small percentage of his claim to guarantee its payment. If the argument of counsel for the Fidelity Company could be sustained, its practical effect would be to strike down the security of every railroad mortgage, and to give to unsecured creditors liens superior to those of the creditors who by mortgage bonds, in reliance upon recorded mortgages, secure their payment. The law and equity, the written contract evidenced by the mortgage and its record, and the rela-

tive equities of the parties, cry out alike against the payment out of the income or the proceeds of the mortgaged property of the claim of a surety on a bond of a mortgagor in preference to the claims of bondholders secured by a prior mortgage. A mortgagor and his sureties cannot, by making a contract or bond with an unsecured creditor to pay the mortgagor's debt to him, transform his unsecured claim into a claim secured by a lien superior to that of bondholders secured by a prior recorded lien, and so are the authorities. *Blair v. St. Louis, etc., Ry. Co.* (C. C.), 23 Fed. 523; *Farmers' Loan & Trust Co. v. Northern Pacific R. Co.* (C. C.), 68 Fed. 36, 39; *Whiteley v. Central Trust Co.*, 76 Fed. 74, 77, 78, 22 C. C. A. 67, 34 L. R. A. 303; *Central Trust Co. v. Third Ave. Ry. Co.*, 180 Fed. 710, 711, 103 C. C. A. 492; *Pennsylvania Steel Co. v. New York City Ry. Co.* (C. C.), 165 Fed. 485; *Gay v. Hudson River Elec. Power Co.* (C. C.), 182 Fed. 904, 909.

The decree below is affirmed.¹

¹ Cf. *Fosdick v. Schall*, 99 U. S. 235 107 U. S. 591 (1883). See also, note, (1878); *Union Trust Co. v. Souther*, 17 Col. Law Rev. 69 (1917).

CHAPTER VII
SPECIAL EQUITIES COUPLED WITH THE MORTGAGE
RELATION: HEREIN OF MARSHALLING

MCBRIDE *v.* POTTER-LOVELL CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1897

(169 *Mass.* 7)

BILL IN EQUITY, filed September 4, 1890, against the Potter-Lovell Company, the Second National Bank of Boston, and, by amendment, against John Brooks and George S. Bullens, assignees in insolvency of the Potter-Lovell Company, and against the North Star Boot and Shoe Company, and divers other defendants, makers of certain promissory notes, which, with promissory notes made by the plaintiffs, the bill alleged, had been fraudulently pledged by the Potter-Lovell Company as security for its own debt to the Second National Bank of Boston. The prayer of the bill was that the assets might be marshalled; that each of the makers of the notes named as defendants should be directed to contribute his equitable-share to the payment of the indebtedness of the Potter-Lovell Company to the Second National Bank; for the appointment of a receiver; for an injunction; and for other relief.

The case was heard on the pleadings, the report of a master, and an agreed statement of facts by BARKER, J., who reserved it for the consideration of the full court.

ALLEN, J. The Potter-Lovell Company, a corporation, held certain notes of the plaintiffs for sale, and it was to remit to them the proceeds, less its commissions for selling the same. The Potter-Lovell Company also held notes of others of the defendants, which it had received from them for sale. Instead of selling the above mentioned notes for the benefit of the several makers, the company at different times wrongfully and fraudulently pledged all of them to the Second National Bank as security for its own debts to said bank, all the notes being pledged for the same debts. The

bank, being a *bona fide* holder for value, without notice, collected enough of these notes from time to time as they fell due, including the notes of the plaintiff and some others, to satisfy its claims against the Potter-Lovell Company. All of the various parties whose notes were thus fraudulently pledged stood on the same footing, except that the notes were pledged at different times, and fell due and were collected at different times; and except that one of the parties, the North Star Boot and Shoe Company, demanded the return of its note from the Potter-Lovell Company before the same was pledged, and has never paid the same in whole or in part to the bank.

These differences do not vary the equitable rights and liabilities of the parties as amongst themselves. The liability to contribute does not depend on a contract between the parties who are held liable to contribute, and is not affected by the fact that notes were pledged and fell due and were paid at different times, or that some of them were paid only in part, or not at all. The notes were pledged to secure the same indebtedness. The fact that some of them fell due at earlier dates than others creates no equity in favor of those which fell due last. See *American Loan & Trust Co. v. Northwestern Guaranty Loan Co.*, 166 Mass. 337. The various parties selected a common agent, and this agent used its power to place them all under a common liability, thus virtually making them all sureties for itself. It might be that under such circumstances the pledgee would prefer to hold one and exonerate another, and it would have power to do so in the first instance by proceeding to collect of one, but not of another. But where several different parties have thus been exposed to loss by the fraud of their common agent, it is more equitable that the burden of the loss should be shared *pro rata*. Under such circumstances equality is equity, without respect to the time of the maturity of the notes. The demand by the North Star Boot and Shoe Company for the return of its note was also immaterial. It was no more fraudulent to pledge this note after such demand than it would have been to pledge it before a demand. All the notes being pledged as security for the same indebtedness, the whole loss in consequence thereof is to be borne by all the makers in proportion to the amounts of the notes so pledged. *Gould v. Central Trust Co.*, 6 Abb. N. C. 381; *New England Trust Co. v. New York Belting & Packing Co.*, 166 Mass. 42, and cases there cited; *Wiggin v. Suffolk Ins. Co.*, 18 Pick. 145, 153; *Warner v. Morrison*, 3 Allen, 566; 1 Story, Eq. Jur., § 493.

The assignees in insolvency of the Potter-Lovell Company have no interest in the case. They have no claim arising upon any of these notes, and no duty in respect to the settlement of the questions involved in this suit.

Decree for the plaintiffs.

AGUILAR *v.* AGUILAR

COURT OF THE VICE CHANCELLOR, 1820

(5 *Maddock's Ch.* 414)

THE Plaintiff, who was the Wife of the Defendant *Aguilar*, having Property to her separate use, joined her Husband in a Grant of an Annuity, and the Grant comprised as well the separate Property of the Wife, as Property given to the Wife for Life, not to her separate use, and to which therefore her Husband was entitled *jure mariti*.

The Wife joined with the Husband in granting other Securities, which were charged upon her separate property alone. The Husband afterwards took the benefit of an Insolvent Debtor's Act, and his Debts being considered of small amount, he subsequently granted two Annuities charged on the Wife's Life Interest, to which he was entitled *jure mariti*.

The VICE CHANCELLOR held, first, that the Wife, being a Surety only in the Grant of Annuity, which comprised her Husband's Property as well as her own, was entitled as between her and her Husband, and the Assignee under the Insolvent Debtor's Act, and subsequent Annuitants, to have the Husband's income first applied in satisfaction of the Annuity.¹

THE OLIVIA A. CARRIGAN

U. S. DISTRICT COURT, S. D. NEW YORK, 1881

(7 *Fed.* 507)

In Admiralty.

CHOATE, D. J. The brig *Olivia A. Carrigan*, belonging to Halifax, Nova Scotia, together with the freight moneys due on her voyage to this port, were attached in a suit in this court for

¹ Remainder of opinion omitted.

seamen's wages, brought by the libellants, McNamara and others. After the service of the monition by the marshal on the parties owing the freight moneys, the sheriff of the county of New York served on them a warrant of attachment against the same freight moneys in their hands, issued out of the supreme court of New York at the suit of the petitioner Bertaux against the owner of the vessel. The vessel was condemned and sold under the decree of this court, and another libel was filed for supplies and materials. In the seamen's suit a decree was entered condemning the vessel and her freight for payment of the seamen's wages, and a final decree directed the payment of the freight to the satisfaction of the claim of the seamen, and that any balance due to the seamen, not paid by application of the freight, be paid out of the proceeds of the vessel. Before the execution of this decree in respect to the freight moneys, and before the freight had been paid into court, the petitioner Bertaux applied to the court for a modification of the decree so that the wages should be paid out of the proceeds of the vessel, leaving the freight moneys to satisfy his judgment, if he should recover judgment in his suit in the state court. This motion was opposed by the petitioner Dimock, who had filed his petition claiming the remnants and proceeds of the vessel under a mortgage from one Doyle, who was claimed to be the owner of the brig at the date of his mortgage, and by Doyle, who claimed the surplus, if any, as owner at the time of the sale of the vessel. Bertaux's application was by motion, on an affidavit; and, without determining whether he obtained any lien on the freight moneys by his attachment subsequent to that of the marshal, it was held that the proper mode of presenting his claim, if any he had, was by petition, and not by motion, and it was ordered that he have leave to file a petition, and in the meanwhile it was directed that the freight moneys be paid into the registry, and the decree in favor of the seamen be satisfied out of the proceeds of the vessel and the freight, leaving the question of the proper marshalling of the assets as between the two funds to be determined when all the parties were properly before the court, and proof should have been taken under the several petitions filed or to be filed. Bertaux has now come in by petition, and by a supplemental petition it appears that he has recovered a judgment for \$288.24. The amount of the freight moneys in the registry is \$653; the proceeds of the vessel remaining in the registry, after satisfying the decree in favor of the seamen and all other decrees for maritime liens, is \$597.18. The mortgage of the petitioner Dimock is dated

April 26, 1880, and there is alleged to be due upon it \$2,000. Bertaux's attachment was made May 18, 1880. And now a motion is made to dismiss his petition on the ground that he cannot have acquired any lien on the freight money by his attachment which this court can recognize, because the previous attachment by the marshal withdrew the debt entirely from the jurisdiction of the state court, and on the ground that his claim upon the freight money, if any, is not of a character to be enforced in this court against a surplus in the registry. The parties have also argued and submitted the question whether the lien of the mortgage or that of the attaching creditor, if they both have liens, should be held to give the better right to have the assets, the proceeds of the vessel and the freight money, marshalled for his benefit.

The remaining question is, which of these parties has the better right to have the fund marshalled for his benefit?¹ Courts of admiralty will, in proper cases, apply the equitable rule, that where one creditor has two funds to resort to and another has but one, the creditor having two will be compelled to look to that fund to which the other has no recourse. This has been applied in case of seamen who have an equal claim on ship and freight, and to whom it is a matter of indifference out of which they are paid. *The Sailor Prince*, 1 Ben. 234, 461; and see *In re Bank of Nova Scotia*, 4 Fed. Rep. 667. In this case the mortgagee insists that the sailors be paid out of the freight, to protect his claim against the vessel. On the other hand, the attaching creditor insists that they be paid out of the ship, to protect his lien upon the freight. In the case last cited, where a mortgagee of the vessel contested a similar question with a party who had a lien on the freight by way of security for advances, it was held that their equities were equal, and it was directed that the seamen be paid *pro rata* out of the vessel and the freight, thus giving an equal protection to their equal equities. In that case, however, each of the parties had an equity based upon what was in fact value paid for his interest or lien at the time of acquiring it. In the present case, however, the attaching creditor has parted with no value for his interest or lien upon the freight. He got, by the law of the state, a lien on the interest of the owner in the freight due. He acquired it, as it seems to me, subject to an equity then existing as between the mortgagee of the vessel and the owner, which the owner could not then have resisted, to have the fund marshalled for the benefit of the mortgagee. The lien of the mortgage has already attached

¹ The opinion on this point only is given.

to the vessel, and the lien for wages to the vessel and freight, and the fund had become insufficient to pay both in full. Under these circumstances, the attaching creditor who takes only the interest of his debtor at the time of the attachment, not by purchase or for value, but merely by operation of law, has no greater equity against the mortgagee than his debtor himself had. Therefore, if the mortgagee shall show the mortgage to be valid, he will be entitled to have the seamen paid out of the freight so far as it will go, notwithstanding the attachment. The freight money was paid in without prejudice to the rights of either party, and the seamen's wages were also paid without prejudice to any ultimate order which it may be just and equitable to make; but, as proof has not been taken under either petition, an order of reference for that purpose must be made.

Motion to dismiss petition denied. Petitions referred to take proof of facts, etc.

BEAVER v. SLANKER

SUPREME COURT OF ILLINOIS, 1879

(94 Ill. 175)

WRIT OF ERROR to the Appellate Court of the Fourth District.

In the year 1866, Victor Buchanan, as administrator *de bonis non* of the estate of John C. Riley, deceased, in pursuance of an order of the county court of Lawrence county, sold at public sale divers tracts of lands belonging to the estate of said Riley.

Israel A. Powell became the purchaser for the price of \$4,178. The order of sale made by the county court required notes, with approved personal security and a mortgage on the lands sold, to be given to secure the payment of the purchase money. Powell accordingly, on July 14, 1866, gave to Buchanan, administrator, his note for the purchase price named, with Johnson and Abernathy as sureties, and also a mortgage on the lands purchased, to secure the payment of the note, the mortgage being duly recorded.

In April, 1869, Buchanan, administrator, obtained a judgment in the circuit court of Lawrence county on the note for a remaining unpaid portion thereof, against Powell, Johnson and Abernathy. Johnson at that time held land upon which the judgment became a lien.

The judgment was made upon execution out of Powell's prop-

erty, except about \$500, which remained unsatisfied until in 1873. In 1870 Johnson sold and conveyed his land, which was subject to the lien of this judgment, to Gustave Kleinworth, by deed, with full covenants of warranty. In 1873 an execution issued upon the judgment was levied upon this land so sold by Johnson to Kleinworth, as the land of Johnson, a co-defendant in the judgment, bound by the lien of the judgment, and the land was sold under the execution February 2, 1874, to D. L. Gold, for \$603.40, and the execution was returned March 1, 1874, as satisfied in full by such sale. Gold was the administrator of the estate of Henrietta Riley, one of the two children and heirs of John C. Riley. On April 20, 1869, Buchanan, administrator of John C. Riley, in settlement of the latter's estate, turned over and assigned to Gold, administrator of the estate of Henrietta Riley, the unpaid portion of said judgment, and at the same time assigned to Gold the mortgage which had been given by Powell to Buchanan at the administrator's sale by the latter.

In January, 1875, Kleinworth, the previous purchaser from Johnson of the land sold under the execution, bought of Gold his certificate of purchase of the land under the execution, paying him therefor \$659, and Gold assigned to Kleinworth the certificate of purchase, as also the said mortgage.

The bill in this case was filed by Kleinworth, asking to be subrogated to the rights of Victor Buchanan, administrator, as the same stood before the said sale of said land under execution, and for the foreclosure of the aforesaid mortgage. Kleinworth died during the progress of the cause, and in his place Gideon Slanker, his administrator, was substituted as a party.

Powell had made sale and conveyance of the several tracts of land described in the mortgage, at different times to different purchasers, Beaver being the last, on May 2, 1868.

The circuit court decreed in favor of the complainant to the extent of the amount he paid Gold for his certificate of purchase of complainant's land, and that the mortgaged lands be sold for the satisfaction of such amount in the inverse order of their alienation by Powell. On appeal by Beaver to the Appellate Court for the Fourth District, the decree was affirmed, and Beaver brings the case here on writ of error to the Appellate Court.

MR. JUSTICE SHELDON delivered the opinion of the Court:

As a mere assignee alone of the mortgage, the complainant might not be able to sustain this decree in his favor, as the judgment for

the mortgage debt was satisfied in full by the sale under execution of Kleinworth's land.

But, upon the doctrine of subrogation, we think there is sufficient support for the decree.

It is the undoubted principle of equity, that if, at the time when the obligation of the principal and surety is given, a mortgage also is made by the principal to the creditor, as an additional security for the debt, then, if the surety pays the debt, he will be entitled to have an assignment of the mortgage and to stand in the place of the mortgagee, and that the mortgage will remain a valid and effectual security in favor of the surety for the purpose of obtaining his reimbursement, notwithstanding the obligation is paid. The mortgage is regarded as not only for the creditor's security, but for the surety's indemnity as well. 1 Story Eq. Jur. § 499; *Rogers v. School Trustees*, 46 Ill. 428; *Phares v. Barbour*, 49 *id.* 370; *Jacques v. Fackney*, 64 *id.* 87; *City National Bank of Ottawa v. Dudgeon*, 65 *id.* 12; *Bishop v. O'Conner*, 69 *id.* 431.

There can be no question, in the case of Johnson himself, the surety, had the land been sold while he owned it, in satisfaction of the judgment, that he would have been entitled to maintain such a bill as the present. The only doubt is, whether the principle in question, of subrogation, applies in favor of a purchaser of the land from Johnson, the judgment against the latter being a lien upon the land purchased. We are of opinion it does. Kleinworth did not make the payment which he did for the certificate of purchase of his land, as a mere stranger or volunteer, but he made it standing in privity with Johnson, the surety, as his assignee of land incumbered with the lien of the judgment against Johnson as surety; and he made it compulsorily, to save to himself his land which had been sold as being bound by this judgment lien. In *Hough v. Aetna Life Insurance Co.*, 57 Ill. 318, and in *Young v. Morgan*, 89 *id.* 199, this court recognized the doctrine that a mere stranger or volunteer could not, by paying a debt for which another is bound, be subrogated to the creditor's rights in respect to the security given by the real debtor; but that if the person who paid the debt was compelled to pay, for the protection of his own interests and rights, then the substitution should be made.

Further, the present proceeding is in the interest of the surety, Johnson, it being in the indirect assertion of his right of indemnity from the mortgaged premises. Johnson sold and conveyed to Kleinworth with covenant of warranty, and so was responsible to the latter for the goodness of the title. Kleinworth, instead of

resorting to Johnson, on the latter's covenant of warranty, and leaving Johnson to have recourse over to the mortgage, proceeds directly against the mortgaged property, which is ultimately liable for the mortgage debt, and in obtaining satisfaction therefrom for the portion of the mortgage debt the sale of his land discharged, secures full indemnity for the surety, Johnson, thus avoiding circuity of action.

And this meets the suggestion, that, in relief of the appellant and other purchasers from Powell, the recourse of Kleinworth should have been against Johnson on his covenant of warranty. If that had been done, then Johnson himself would have been subrogated to the rights under the mortgage, so that, in the end, the result to appellant would have been the same—the subjecting of the mortgaged premises. There is, besides, reason to believe that suit upon the covenant of warranty would have been unavailing. Johnson has deceased, and the records of the probate court show his estate to be insolvent. To be sure, this showing is in respect of personalty only, and there is a possibility of the decedent having left lands which might respond upon the covenant of warranty; nothing appears as to this.

The circumstance of Powell having sold the mortgaged lands, and they now being in the hands of purchasers from him, should make no difference. Such purchasers occupy no better position than Powell himself. The mortgage was upon record, and they bought with notice that the lands were mortgaged; that they stood as security for the payment of this mortgage indebtedness, and as indemnity to the sureties against its payment, and that they were liable to be resorted to and sold for the purpose of such security and indemnity.

They are now proceeded against but for such purpose, and these purchasers have no equitable cause of complaint.

If it be regarded important that they should have had notice that Johnson and Abernathy were sureties only, we think they were chargeable with such notice.

The proceedings of the county court under whose order of sale the administrator's sale of these lands of Riley was made, were a link in the chain of title of the mortgaged lands, and purchasers from Powell must be held as having notice of them. These proceedings show that the sale was to be on a credit, and that the purchaser was to give a mortgage on the land purchased, and a note with personal security; they show the sale of the lands to Powell, and Powell alone gives the mortgage on the lands pur-

chased. These circumstances, we think, afford notice that Powell was the principal in the transaction, and Johnson and Abernathy but his sureties. The answer of Beaver, too, admits such suretyship.¹

The decree will be affirmed.

GASKILL *v.* WALES

COURT OF ERRORS AND APPEALS OF NEW JERSEY, 1883

(36 *N. J. Eq.* 527)

THE CHANCELLOR.

This is an appeal from a decree of the Burlington circuit court in a suit for foreclosure of a mortgage held by the respondents' testator, Dr. Edmond L. B. Wales, on land in that country. The mortgaged premises are a tract of twenty-two and seventy-one hundredths acres. They were owned on the 11th day of May, 1874, by Joseph Grubb, and were then subject to two mortgages thereon, given by him to Caleb Wilkins, one for \$1,000 and interest, and the other for \$200 and interest. On that day Grubb borrowed of Dr. Wales \$2,000 on mortgage of the property, and it was agreed between them that the mortgage should be the first lien thereon. It was given accordingly. With part of the \$2,000 the Wilkins mortgages were paid, and they were then, by direction of Dr. Wales's attorney, canceled of record. On the 1st of May, 1874, a few days before the Wales mortgage was given, Grubb began the building of a dwelling-house on part of the property. The firm of Laumaster & Wright and Samuel E. Hancock furnished materials for the home, and Nathan Gaskill did work thereon. They filed and prosecuted to judgment lien-claims under the mechanic's lien law, for money due them therefor, and under executions on those judgments the dwelling-house and the curtilage thereof were sold, December 11th, 1875, to Hancock and the firm of Laumaster & Wright. The respondents claim that they are in equity entitled to be subrogated to the rights which Wilkins had under his mortgages when they were paid off, to the extent to which the money lent by their testator was used in the payment of those mortgages, and that for that amount and interest they are entitled to priority over the purchasers of the property under the lien-claims. The principle of subrogation is one of equity merely,

¹ Portion of opinion dealing with foreign questions omitted.

and it will accordingly be applied only in the exercise of an equitable discretion, and always with a due regard to the legal and equitable rights of others.

In the case in hand, the Wilkins mortgages were canceled of record, and the purchasers under the executions had no notice of any kind of the existence of any claim to the equity. They had no notice except what the records afforded. To give the respondents' mortgage priority over the lien-claims would therefore manifestly be highly unjust to the purchasers who bought in ignorance of any right or claim to such priority. In the absence of any other notice they, of course, had a right to rely on the condition of the records, and having done so they cannot be defeated or prejudiced by a latent equity. Their title, therefore, to the dwelling-house and curtilage is paramount to the respondents' mortgage. The decree will be reversed, with costs, with directions to the circuit court to enter a decree for the foreclosure and sale of the rest of the property only.

Decree unanimously reversed.

HOWARD v. ROBBINS

COURT OF APPEALS OF NEW YORK, 1902

(170 N. Y. 498)

CULLEN, J. The defendant and respondent, Walter G. Robbins, on September 4th, 1897, executed and delivered to the plaintiffs' testator a bond with a mortgage on certain leasehold property in the city of Buffalo to secure the payment of five thousand dollars. On March 21st, 1898, Robbins and wife conveyed the premises to the Ellicott Square Bank by quitclaim deed for a consideration of one dollar, in which deed there was no reference to the mortgage. The bank paid one thousand dollars on account of the principal of the mortgage. On September 14th, 1899, the bank conveyed the same premises to Harriette E. Jones for the sum of one thousand dollars, which deed contained the following provision: "This conveyance is made with the understanding that the party of the second part assume a certain mortgage given by Walter G. Robbins and Francis H. Robbins to Ethan H. Howard, and recorded in Erie county clerk's office in Liber 863 of mortgages on page 14 (the mortgage in suit)." On November 9th, 1899, Harriette E. Jones mortgaged the same premises, "subject to a mortgage owned

by Caroline H. Howard, upon which there is due four thousand dollars," to Mary H. Ney to secure the payment of two thousand dollars. This last-mentioned mortgage was on the same day assigned to the defendant and appellant, the Third National Bank of Buffalo. In January, 1891, the plaintiffs brought an action to foreclose said first-named mortgage in which judgment of foreclosure and sale was entered on March 6th, 1891. The decree directed a deficiency judgment against the defendant Walter G. Robbins only. Shortly thereafter the bond, mortgage and judgment were assigned to the defendant, the Third National Bank of Buffalo. Robbins, through his attorney, then requested the Third National Bank that it either forthwith execute the judgment or that it assign the same to him, and tendered the amount due thereon. The bank declined to accede to this demand, and under an arrangement with the owner of the equity, Mrs. Jones, collected the income of the property and applied it on its mortgage. The unexpired term of the leasehold was about fifteen years. The owner had made default in the ground rent and taxes which the plaintiffs had been obliged to pay. On an affidavit stating these matters and the further fact that Robbins had originally bought the premises as the agent of the Ellicott Square Bank and had executed the mortgage on an agreement made by the bank that it would indemnify and save him harmless from liability on account thereof, Robbins applied for an order directing the appellant to assign to him the decree and mortgage on the payment of the amount due thereon. This motion was resisted. There was no dispute as to the chain of title which has been stated, but the appellant denied any knowledge of the relations between Robbins and the Ellicott Square Bank or of the agreement for indemnity between the parties. The application of Robbins was granted and an appeal from that order taken to the Appellate Division. After such appeal Robbins moved for the appointment of a receiver of the rents and profits, which application was granted. From that order also an appeal was taken to the Appellate Division, which by a divided court affirmed both orders. The Appellate Division has allowed an appeal to this court and certified to us the following questions: *First*: Is the defendant Walter G. Robbins entitled to compel the execution and delivery of an assignment of the bond, mortgage and judgment of foreclosure and sale to him from the Third National Bank of Buffalo, N. Y.? *Second*: Should a receiver of the rents, issues, income and profits of the leasehold property described in the complaint be appointed?

We are of opinion that the County Court properly directed an assignment of the mortgage to the respondent. In reaching this conclusion we do not deem it necessary to decide whether the defendant Harriette E. Jones became personally liable for the mortgage debt, though we do not mean to express any dissent from the prevailing opinion of the Appellate Division on that point. It is sufficient for the disposition of this branch of the appeal to determine whether as to the respondent Robbins he or the mortgaged land was primarily liable for the mortgage debt. While in the first instance the mortgagor is the principal debtor and the land merely security, this relation may become modified when the mortgagor ceases to be the owner of the land. Thus if the land be sold on execution against the mortgagor or under a second mortgage the purchaser acquires only the equity of redemption and the land becomes the primary source from which the mortgage must be satisfied, not the personal responsibility of the mortgagor. (*Tice v. Annin*, 2 Johnson Ch. 125; *McKinstry v. Curtis*, 10 Paige, 503; *Weaver v. Toogood*, 1 Barb. 238; *Mathews v. Aikin*, 1 N. Y. 595.) In case of the voluntary alienation of the land by the mortgagor the question as to where the primary liability rests depends on the agreement of the parties. If the mortgagor convey with warranty and in this state if he receive the whole purchase money and convey, even without warranty by deed not subjecting the land to the mortgage he remains primarily liable for the debt. (*Wadsworth v. Lyon*, 93 N. Y. 201.) On the other hand, the deduction of the amount of the mortgage evidences an intent to subject the property conveyed to its payment. (*Bennett v. Bates*, 94 N. Y. 354.) The general rule is laid down in Jones on Mortgages (section 736): "One who purchases an equity of redemption by a deed without covenants takes the estate charged with the payment of the mortgage debt. It is presumed, in the absence of a special contract or of any unusual circumstance, that the amount paid was the price of the property purchased, less the amount of the mortgage, and it would be for the purchaser, and not the seller, to discharge the incumbrance." This was so held in *Shuler v. Hardin* (25 Ind. 386); *Atherton v. Toney* (43 Ind. 211); *Gayle v. Wilson* (30 Gratt. 166). In this case the conveyance by the respondent was a quitclaim deed and the consideration was one dollar. The form of the deed was appropriate for the conveyance of the equity of redemption and it cannot be presumed in the absence of evidence of an agreement to that effect that the grantor intended to convey for the sum of one dollar land which he had

been able to mortgage for five thousand dollars, he to remain bound to discharge the incumbrance. On the face of the deed the presumption, therefore, is that the land was to be primarily charged with the payment of the mortgage. This intention is further evidenced by the conveyance from the Ellicott Square Bank to the defendant Harriette E. Jones. Conceding that Mrs. Jones did not become liable personally for the payment of the mortgage debt because her grantor was not liable for it, nevertheless her agreement to assume the mortgage certainly was effective to charge the land conveyed with its payment. The land being conveyed to her subject to the mortgage, neither she nor her grantees could deny that it was primarily charged with the payment of the debt. (*Sands v. Church*, 6 N. Y. 347.) The mortgage under which the appellant claims also recites that it is subject to the mortgage made by the respondent. Under these instruments it would seem entirely plain that the appellant never acquired as security for its loan anything more than the equity of redemption after the discharge and satisfaction of the first mortgage. The respondent, therefore, was entitled on payment of his bond to be subrogated to the rights of the mortgagee and to require an assignment of the mortgage in order that he might reimburse himself by enforcing it against the mortgaged property. (*Johnson v. Zink*, 51 N. Y. 333.) It is true that, as between the appellant and the plaintiffs in this action, the former was entitled to an assignment of the mortgage, but as the respondent was entitled on payment to subrogation as against the mortgagee he could be no less entitled to that relief as against any assignee of the mortgagee. The only interest the respondent had was to relieve himself from liability on the bond. If the appellant wished to keep the security alive against the land, and it had offered to discharge the respondent from personal liability, doubtless the application would, on compliance with that condition, have been denied. So, also, if the appellant desired an immediate sale of the property, the court might properly have required the prompt execution of the judgment as a condition of the assignment. These, however, were matters resting in the discretion of the trial court. It sought to satisfy its mortgage out of the mortgaged property, to the detriment of the first mortgage, and then to hold the respondent liable on his bond.

It had no right to pursue that course. It is said that the liability of the respondent as the principal debtor was fixed by the judgment and foreclosure, and that the appellant, in purchasing the judgment, was entitled to rely on the assumption that the

rights of the parties were conclusively established by it. The judgment did not settle the liabilities of the defendants as between themselves. (*Wadsworth v. Lyon, supra.*) If it had, it would be fatal to the appellant's position, for the judgment decreed that the land should be sold first and the respondent answer only for any deficiency, thus making the land the primary source for the payment of the mortgage.

The facts appearing in the affidavits were sufficient to justify the trial court in appointing a receiver pending the appeal, which is expressly authorized by section 713 (sub-div. 3) of the Code of Civil Procedure. The ground rent and taxes were in arrears and the security doubtful. The pecuniary responsibility of the respondent was wholly immaterial, as the judgment was to be enforced not against him, but in his favor.

The order appealed from should be affirmed, with costs, and both questions certified answered in the affirmative.¹

PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT, HAIGHT and WERNER, JJ., concur.

HARBERT'S CASE

COURT OF EXCHEQUER, 1584

(3 *Coke's Rep.* 11b)

AND in this case divers points were resolved:

Secondly,² it was resolved, that in case of a common person, the heir of the conusor, or he against whom the judgment is given in debt, shall be only charged, and shall not have contribution against the ter-tenant in some cases, and in some cases he shall have contribution, and shall not be only charged. For if a man be seised of three acres of land, and acknowledges a recognizance, or a statute, &c., and enfeoffs A of one acre, B of another, and the third descends to his heir; in this case, if execution be sued only against the heir, he shall not have contribution, for he comes to the land without consideration, and the heir sits in the seat of his ancestor. *Et hæres est alter ipse, et filius est pars patris*, and as it is said, *mortuus est pater, et quasi non est mortuus, quia reliquit similem sibi*; and therefore the heir shall not have contribution against any purchaser, although *in rei veritate* the purchaser came

¹ And see *Sternbach v. Friedman*, 34 App. Div. (N. Y.) 534 (1898).

² The opinion on this point only is given.

to the land without any valuable consideration, for the consideration of the purchase is not material in such case. And so it was of late resolved in the case of Thomas Gawdie, late Marshal of the King's Bench, that the heir may be solely charged, and shall not have contribution against purchasers.¹

SANFORD *v.* HILL

SUPREME COURT OF ERRORS OF CONNECTICUT, 1878

(46 Conn. 42)

PARDEE, J. In 1870, Maria Bouton mortgaged a certain tract of land, with other lands, to the Norwalk Savings Society to secure the payment of \$10,000; in 1871 she conveyed a portion of this tract, which we will designate as lot B, to E. J. Hill, by a deed warranting it to be free and clear from all incumbrances, which deed was immediately recorded in the town records. When he received it he made a parol agreement with the grantor that he would pay \$300 upon the mortgage indebtedness to the savings bank as part consideration for his purchase. In 1873 he conveyed his interest in the lot to Hubbell & Tolles, by a quit-claim deed, in which there was no mention of any mortgage upon it, which deed was duly recorded. They entered into a parol agreement with Hill to pay the \$300 to the bank; neither Hill nor Hubbell & Tolles have ever paid this money, and the last two were adjudged bankrupts in 1875, and John H. Smith was appointed their assignee.

In 1873, Maria Bouton conveyed a portion of the tract originally mortgaged to the bank, which we will designate as lot C, to Delia A. Sanford, the petitioner, by a quit-claim deed.

1/ Maria Bouton, by giving a deed of warranty of B to E. J. Hill,

¹ In *Lanoy v. Duke of Athol*, 2 Atk. 444, LORD HARDWICKE said: "Suppose a person who has two real estates, mortgages both to one person, and afterwards only one estate to a second mortgagee, who had no notice of the first; the court, in order to relieve the second mortgagee, have directed the first to take his satisfaction out of that estate only which is not in mortgage to the second mort-

gagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee, even though the estates descended to two different persons."

To similar effect, see CHANCELLOR KENT in *Clowes v. Dickenson*, 5 Johns. Ch. 235 (1821), and MILLER, J., in *National Savings Bank v. Creswell*, 100 U. S. 630 (1880).

so far forth as they and any subsequent purchasers of C are concerned, freed B from the burden of the mortgage and placed it upon C; this last lot, upon foreclosure by the bank, must have paid the whole debt if of sufficient value; Hill, by recording his deed, gave notice to all persons of the precise nature and extent of her right to and interest in C; under such notice Mrs. Sanford took precisely that right and no greater, presumably taking the fact disclosed by the notice into consideration in establishing the price; Hill's rights in and to B having been previously fixed by the record of his deed are not to be diminished or affected by the subsequent conveyance of C.

Ebenezer Hill, having purchased of the savings bank the Bouton note and mortgage, brought in December, 1875, a petition for foreclosure, making the present petitioner, Mrs. Sanford, and Smith as assignee of Hubbell & Tolles, respondents; the court passed a decree foreclosing Mrs. Sanford unless she paid the debt on or before April 3d, 1876, and Smith unless he paid on or before April 10th. Mrs. Sanford paid to Ebenezer Hill the whole amount due upon the mortgage, and received from him the note, together with a conveyance of his interest in B and C; and she has brought this present petition to compel David Hill to contribute towards the sum thus paid such proportion as lot B bears in value to lots B and C. The court below found that proportion to be \$282.50, and decreed that he should pay that sum.

smile of Smith

The verbal promise to pay \$300 on the mortgage debt made by E. J. Hill to Maria Bouton was accepted by the latter as part of the price of the land; this promise was made known to Hubbell & Tolles, who verbally promised E. J. Hill that they would pay this sum. The recorded deeds contain no reference to this agreement, and the case finds that David Hill had no knowledge of it until after he had taken his deed. He is a *bona fide* purchaser for full value without notice. He is, of course, to be charged with notice that the mortgage covered lot B, but the extent of that notice is, that B is chargeable in equity only after C is exhausted; his ignorance of the private parol agreement releases him from any equitable duty in reference to it; that agreement being private and unrecorded the effect of it ceases exactly when actual knowledge of it ends.

The rule which imposes the burden primarily upon lot C, in the inverse order of conveyance by Mrs. Bouton, is a logical result of our recording system and has a firm foundation in equity; moreover, it is the prevailing rule in this country and in England. In

Clowes v. Dickinson, 5 Johns. Ch. 240, Chancellor Kent referred to *Harbert's Case*, 3 Coke, 11, where it was resolved that if a man be seized of three acres and acknowledge a recognisance or statute, and enfeoff A of one acre and B of another, and the third acre descends to the heir, and execution be sued out against the heir, he shall not have contribution against purchasers, "for the heir sits in the seat of the ancestor;" and the chancellor adds, in reference to successive purchasers of different portions of incumbered property, that they too may be said to sit in the seat of their grantors. The rule has received judicial sanction in the following cases:—*James v. Hubbard*, 1 Paige, 234; *Jenkins v. Freyer*, 4 id. 53; *Guion v. Knapp*, 6 id. 35; *Patty v. Pease*, 8 id. 277; *Skeel v. Sproker*, id. 182; *Lyman v. Lyman*, 32 Verm. 79; *Shannon v. Marselis*, 1 Saxton, 413; *Wickoff v. Davis*, 3 Green. Ch. 224; *Hinkle v. Alstadt*, 4 Gratt. 284; *Jones v. Myrick*, 8 id. 179; *Brown v. Simmons*, 44 N. Hamp. 475; *Holden v. Pike*, 24 Maine, 427; *Shepherd v. Adams*, 32 id. 63; *Wallace v. Stevens*, 64 id. 225; *Chase v. Woodbury*, 6 Cush. 143; *Cooper v. Bigley*, 13 Mich. 463.

In Kentucky (*Dickey v. Thompson*, 8 B. Monroe, 312,) and in Iowa (*Bates v. Ruddick*, 2 Clark, 423,) the rule of equality of contribution among all the purchasers of the mortgaged premises, contended for by the petitioners, is applied, but we think that the weight of judicial opinion is as we have before indicated.

The petitioners urge that, inasmuch as David Hill took his deed of lot B from Smith, assignee of Hubbell & Tolles, on a day subsequent to the bringing of the petition for foreclosure by Ebenezer Hill, the purchaser of the note and mortgage from the bank, and as Mrs. Sanford's claim for contribution against lot B arises from the fact that the decree upon that petition compelled her to pay the whole debt first in order of time, she now has the same right against David Hill that she would have had against Smith, assignee, his grantor.

But the doctrine of *lis pendens*, that the purchaser of property the title to which is then the subject-matter of judicial investigation, is held to have notice of the existing suit and is to be bound by the future judgment or decree therein, does not assist the petitioners. The pending litigation was the petition for foreclosure by Ebenezer Hill, the owner of the original note and mortgage, enforcing the rights held by the bank on the one side and Mrs. Sanford and David Hill, subsequent purchasers of lots covered by the mortgage, on the other, the bank, or its assignee, Ebenezer Hill, had the right to receive the amount of the debt from lot C

or from both B and C; and the court simply enforced the equities existing between the last named parties, by placing the whole burden primarily upon lot C. But it was neither the prayer of the petition, nor the issue of the pleadings, nor the scope of the decree, to determine that lot B was liable to contribute to the payment of the mortgage. That question was first raised in this proceeding, and remains unaffected by any previous litigation.

There is error in the judgment complained of.

WORTH v. HILL

SUPREME COURT OF WISCONSIN, 1861

(14 Wis. 559)

PAYNE, J. This was an action to foreclose a mortgage, and the appeal presents a contest merely between two subsequent incumbrancers of different tracts covered by this mortgage, as to which was entitled, in equity, to have the tract of the other sold first. Perhaps the following general statement of the situation of the parties, will be sufficient to a proper understanding of the question decided.

The mortgage being foreclosed covered two different tracts in different towns. The defendant *Buck*, who is the appellant, held a mortgage next to this in point of time, covering one of the tracts contained in this mortgage, and other land not covered by this, in the same town. The defendant *Mowry* held a mortgage next to *Buck's* in point of time, but upon the land in the other town covered by this mortgage, and also upon another tract. Thus it will be seen that the mortgage of *Mowry* was not upon any part of the land mortgaged to *Buck*, but their interests conflict by reason of the mortgage which is being foreclosed, which is prior to both, and covers a part of the land incumbered by each of these defendants. It further appeared that there was a mortgage prior to all these, covering the tract in the *Buck* mortgage and the one in the *Mowry* mortgage which are not contained in the mortgage now being foreclosed, and that such prior mortgage had been foreclosed, and that part which was covered by *Mowry's* mortgage adjudged to be sold before the part covered by *Buck's*. It was further proved that the other tract covered by *Buck's* mortgage was ample security for the amount of the debt secured by that mortgage. It was even shown to be of greater value than the entire amount of

the *Buck* mortgage and the first mortgage before referred to, prior to all, for the satisfaction of which the other tract covered by *Mowry's* mortgage had been adjudged to be first sold. Upon this state of facts, the court below decreed that the portion covered by *Buck's* mortgage should be sold in this foreclosure before that covered by *Mowry's*, and from that part of the decree *Buck* brought this appeal.

His counsel relies upon the established equitable rule, that in foreclosure cases, where the land has been subsequently conveyed by the mortgagor, it shall be sold in the inverse order of alienation. The justice of this rule has been some time questioned, but we regard it as not only well settled, but correct upon principle, and have repeatedly enforced it. But at the same time we think it may be controlled by other established equitable principles, where the facts render them applicable, and such we think was the case here. It is a familiar principle, that where one creditor has security upon two funds, and another has security upon one of them only, the latter may compel the former to resort first to that fund which he cannot reach. And although this is not a direct proceeding to accomplish that object, yet it is substantially that, inasmuch as *Mowry* sets up these facts to rebut the equity *Buck* would otherwise have as against him. For the result, if the judgment had been otherwise, would have deprived *Mowry* of his security entirely. The one tract covered by his mortgage having already been adjudged to be sold first, for *Buck's* benefit, now if the other should be adjudged to be sold first, he would have nothing left. Whereas it appears by the testimony, that upon the decree as rendered, *Mowry* is protected, and *Buck* left with ample security for his debt.

Suppose A mortgages a tract to B, then gives a second mortgage on a part of it to C, which mortgage also covers other tracts, and then gives a mortgage on another part to D? On a foreclosure of B's mortgage, the ordinary rule, based merely on the order of alienation, would be to sell D's part first. But suppose D could show that the other tracts covered by C's mortgage were an ample security for his debt, would not that raise an equity sufficient to overcome the ordinary rule, and require, as between C and D, that C's part should be first sold? I think so; and that is substantially the relation which these defendants hold to each other in the present case. I can see no reason why the principle requiring the creditor having two funds to resort first to the one which the other creditor cannot reach, is not applicable to such a case. It is true

that ordinarily the adequacy of the first fund might be tested by an actual sale, and the creditor who was compelled first to resort to that, might still be in a position to resort to the other, to supply any deficiency; and here *Buck* may not be left in such a position. I think that is good reason why such a decree as the one made in this case, should be made only upon clear proof of the entire inadequacy of the remaining security. But I am not prepared to say that courts should not act upon such proof, or that a party so situated has any absolute right to have the adequacy of his remaining security tested in all cases by an actual sale. It is obvious that such a test could not be had in a case like this, and consequently, if that rule were adopted, it would lead to the injustice of cutting off the last mortgagee entirely, though it might not be at all necessary for the protection of the second. Courts are constantly adjudicating upon the most important rights of parties upon the theory that human testimony can establish facts with sufficient certainty to justify such adjudication, and I think the question of the adequacy or inadequacy of a security should form no exception.

I think the judgment should be affirmed, with costs, against the appellant, in favor of the plaintiffs and of *Mowry*.

Judgment affirmed accordingly.

LIBBY v. TUFTS

COURT OF APPEALS OF NEW YORK, 1890

(121 N. Y. 172)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 18, 1888, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought for the foreclosure of a mortgage.

The facts are sufficiently stated in the opinion.

O'BRIEN, J. The action was brought to foreclose a mortgage given to secure the payment of \$125,000, bearing date January 29, 1883, and duly recorded the next day, upon ten several lots of land in the city of New York, upon which houses were being constructed at the time of the execution and delivery of the mortgage; the houses having been completed at the time of the commence-

ment of this action. Nine of the lots were released from the lien of the mortgage from time to time, as payments were made, and prior to the commencement of the suit. The complaint states that the sum of \$3,603.22 was due and unpaid upon the mortgage, but the referee found that the amounts so due was \$1,801.61.

Only one of the ten lots is sought to be sold under the prayer of the complaint and the terms of the decree entered in the action.

The mortgage in question was executed by Mary Duffy and her husband to the plaintiff, and its purpose was to secure the payment of the purchase-price of the lots, and also certain advances of money made, or to be made, from time to time to the mortgagor for the purpose of aiding in the construction of buildings upon the lots.

The controversy in the case arises out of the answer of the defendant Tufts, that after the execution of the mortgage, and on the 7th day of August, 1883, Mary Duffy, the mortgagor, conveyed the lot directed by the decree in this action to be sold to him; that his deed was duly recorded on the 8th day of August, 1883, and that then the mortgage in question was a lien upon his lot, and also upon another lot which the mortgagor afterwards, and on the 29th day of August, 1883, conveyed to one James Kane; that the plaintiff having full notice of the rights of the defendant Tufts, nevertheless, thereafter, and in the month of October, 1883, without defendant's knowledge or consent, released and discharged the lot conveyed to Kane from the lien of the mortgage, and that the premises so released were, in value, more than sufficient to pay any sum due for principal and interest on the mortgage.

The referee has found that the conveyances to Kane and Tufts, and the release of the mortgage upon his lot, were made and delivered at the respective dates set forth in the answer, and the defense interposed by Tufts would be good were it not for other facts and other transactions connected with the deed to Kane which will presently be noticed.

The general equitable rule that when a mortgage covers several parcels of land that are separately and at different dates sold by the mortgagor, they are each liable to sale in satisfaction of the mortgage, as against the purchasers from the mortgagor, in the inverse order of alienation, is not disputed. Where the holder of a mortgage, with notice of the conveyance of a separate parcel of the land to a purchaser from the mortgagor, releases a part of the land subject to be sold first for the satisfaction of the mortgage, that fact generally constitutes a defense to the earlier purchaser

to the extent of the value of the land released. (*Trustees, etc., v. Wheeler*, 61 N. Y. 88; *Kendall v. Woodruff*, 87 *id.* 7; *H. Ins. Co. v. Halsey*, 8 *id.* 271.)

This general rule, however, is, in equity, made to yield to the requirements of justice. It was said in *Kendall v. Woodruff* (*supra*) that "it is not always that a release of part of the mortgaged premises, given with knowledge of a prior conveyance of another part that remains unreleased, is held inequitable. It is not a technical discharge of that part, nor is it an equitable release or discharge, unless upon principles of natural equity and justice it ought to operate against the mortgagee giving the release."

The referee has found, upon sufficient evidence, that the contracts in writing entered into with Kane, though in form signed by the husband of the mortgagee and owner of the land, were yet her contracts, made under her direction, and bound her in the same way as if she signed them herself.

Whether the discharge by the plaintiff of the lien of his mortgage upon the lands to Kane, operated in equity to the prejudice of the defendant Tufts, is not to be ascertained or tested by the mere fact that Kane's deed was made and delivered at a later date than that of the defendant Tufts. The referee has found that at the time the plaintiff released his mortgage upon the lot conveyed to Kane, he had notice of the conveyance, prior in point of date, to the defendant Tufts. But behind the conveyance and release to Kane are certain facts and equitable considerations which cannot be overlooked in adjusting the rights of the parties.

As early as February, 1883, Mrs. Duffy, the mortgagor and owner, entered into a contract with Kane for the sale of the lot which was afterwards conveyed to him. Kane was to pay \$9,000 for it by performing certain work and labor in the plumbing of the houses then in process of construction and to furnish the materials for that purpose. It is found that as early as July, 1883, he had performed his contract, paid the purchase-price as provided by the contract, and entered into the possession of the premises. Prior to this time the plaintiff had full notice of the contract and of all of Kane's rights under it, his payments thereon and his possession. Thus it will be seen that a month prior to the deed of the mortgagor to the defendant Tufts, Kane had contracted to purchase the lot afterwards conveyed to him, and had gone into possession of the same, and paid the consideration therefor. This in equity constituted him the owner. True he did not receive the deed to the premises until the twenty-ninth of August following, but he

had possession, and every right in equity of an absolute owner in fee, and we think the case should be determined in the same way as if Kane received his deed at the time he fulfilled his contract and went into possession. On the seventh of August thereafter, when the defendant Tufts took his conveyance, Kane's possession of the other lot was notice to him and to all the world of his rights. Therefore, we think that the mere fact that Kane's deed was executed and delivered at a later date than that of the defendant Tufts, is not a controlling circumstance, in view of his antecedent rights and equities.

It appears also by the findings of the referee, that the consideration of the deed given by the mortgagor to the defendant Tufts, was a past due debt, while Kane at the time of taking his contract above referred to obligated himself to pay in the future the sum of \$9,000 in furnishing the material and the performance of the work in the construction of the houses upon the lots in question. Manifestly Kane's equity is stronger than that of Tufts, and while Kane is not a party to this action we think that the act of the plaintiff in executing the release to him is nothing more than he could be compelled to do, if Kane has been made a defendant.

We think that the case was correctly decided in the court below, and that the judgment should be affirmed with costs.

All concur.

Judgment affirmed.

MONARCH COAL & MINING CO. v. HAND

APPELLATE COURT OF ILLINOIS, THIRD DISTRICT, 1901

(99 Ill. App. 322)

MR. PRESIDING JUSTICE HARKER delivered the opinion of the court.

Appellee filed a bill to foreclose a mortgage on 116 acres of land, executed by Jonathan A. Emans and wife, on the 13th of December, 1894, to secure the payment of a promissory note for \$3,500, payable to appellee. Emans and wife and appellant were made defendants. The two former were defaulted, but appellant answered and filed a cross-bill setting up a deed executed by Emans to it on July 1, 1898, whereby he conveyed to appellant a small part of the land in fee and the coal underlying the balance, and asked that in the decree foreclosing the mortgage, the portion of

the premises still remaining in Emans be first offered for sale subject to the right of appellant in the premises, and that the entire premises only be offered for sale and sold in the event that the interest still remaining in Emans should not sell for a sum sufficient to satisfy the mortgage debt. The court sustained a demurrer to the cross-bill and after hearing the cause on the original bill and amended answer, rendered a decree of foreclosure, finding there was due appellee on her mortgage \$3,244; that the conveyance from Emans to appellant was expressly subject to the mortgage; that appellant was mining coal from the premises, thereby committing waste; and that the land was scant security for the mortgage debt. The court refused to direct the land to be offered for sale in the order requested by appellant and enjoined it from mining any coal from it after the expiration of forty days unless the mortgage debt should be paid.

The leading question involved is whether the court erred in refusing to apply the doctrine of marshaling assets and decreeing that the mortgaged premises be first offered for sale subject to appellant's right to mine the coal as granted by the conveyance of July 1, 1898. There was no error in sustaining a demurrer to the cross-bill. Under the rules of equity pleading, a subsequent purchaser or junior mortgagee, who is made a defendant in a bill to foreclose the senior mortgage, may, by answer, ask and obtain an order in the decree directing that the mortgaged premises be offered for sale in the inverse order of the conveyances. Really, that was what was done in this case, for the amended answer asked for such order.

To the equitable doctrine of marshaling assets between different mortgagees, judgment creditors and purchasers, the courts of this State are firmly committed. But we do not think that is a proper case for the application of that doctrine. The conveyance to appellant expressly provides that it is made "subject to a mortgage to Jane Hand in the principal sum of \$3,500." A purchaser having consented to take a conveyance of real estate subject to a mortgage upon it, must be considered as consenting that his part of the land shall remain, pro rata, liable for the mortgage debt. *Briscoe et al. v. Power*, 47 Ill. 447; *Boone et al. v. Clark et al.*, 189 Ill. 466. We quote from the opinion of Justice Lawrence in *Briscoe et al. v. Power*, *supra*:

"We held in the case of *Iglehart v. Crane & Wesson*, 42 Ill. 261, that where a mortgagor sells the mortgaged premises in parcels, at successive periods, the different parcels should be subjected to

the payment of the mortgage in the inverse order of their alienation. That rule rests upon the reason that where the mortgagor sells a part of the mortgaged premises, without reference to the incumbrance purporting to convey the fee simple, and retaining a part himself, it is equitable, as between the mortgagor and his grantee, that the part still held by the mortgagor should be first subjected to the payment of the debt, and this equity having attached to the land, a subsequent purchaser from the mortgagor, with notice, takes it subject to the same equity. But it is evident that this reasoning has no application to a case like the present, where the first purchaser expressly takes subject to the mortgage. In such cases, the purchaser has no equity, as against the mortgagor, that the portion still held by the latter shall be first applied to the payment of the incumbrance, and having no equity against him, of course has none against his grantee. The first purchaser, by taking expressly subject to the mortgage, consents that the land conveyed to him shall remain subject to its *pro rata* share of the debt."

It was not error to enjoin appellant from further mining coal from the premises after forty days unless the mortgage debt should be paid. The evidence tended to show that the land was scant security for appellee's debt, and the court so found, although there was a conflict in the testimony upon that point. Large quantities of coal had already been taken from the land and a continuation of the work would depreciate appellee's security, of course.

We see no error in the decree rendered and the same will therefore be affirmed.

BOOK IV

ENFORCEMENT OF THE MORTGAGE BY MORTGAGEE

(a) *Strict Foreclosure*

4 KENT, COM. 181. The equity of redemption which exists in the mortgagor, after default in payment, may be barred or *foreclosed*, if the mortgagor continues in default after due notice to redeem. The ancient practice was, by bill in chancery to procure a decree for a strict foreclosure of the right to redeem, by which means the lands became the absolute property of the mortgagee. This is the English practice to this day, though sometimes the mortgagee will pray for, and obtain, a decree for a sale of the mortgaged premises, under the direction of an officer of the court, and the proceeds of the sale will, in that case, be applied towards the discharge of encumbrances according to priority. *Monday v. Monday*, 1 Ves. & Beame, 223. The latter practice is evidently the most beneficial to the mortgagor, as well as the most reasonable and accurate disposition of the pledge.

CLARK v. REYBURN

SUPREME COURT OF UNITED STATES, 1808

(8 Wall. 318)

MR. JUSTICE SWAYNE stated the case, and delivered the opinion of the court.

This is an appeal in equity. Reyburn is the complainant. Florinda Clark and Few only were made defendants by the original bill. She answered. Few filed a plea and demurred. On the 5th of May, 1862, leave was given to the complainant to amend his bill, and leave was given to Mrs. Clark to withdraw her answer. It had been filed as her answer in a former case, and was refiled in this case. The court ordered it to be restored to the files from which it had been taken. The complainant thereupon filed an amended bill whereby Jeremiah Clark was brought into the case as a defendant.

The amended bill states the following case:

That on the 30th of April, 1859, Jeremiah Clark executed to the complainant his promissory note for \$5,250, payable twelve months from date, with interest after maturity at the rate of twenty-five per cent. per annum. On the same day, Clark and wife executed to the complainant a mortgage upon the real estate therein described, conditioned to secure the payment of the note. The mortgage was acknowledged by the grantors, and duly recorded. Clark failed to pay the note at maturity. The complainant, on the 5th of October, 1861, filed his bill of foreclosure against the same parties who are defendants in this suit. Before the hearing, the bill was dismissed as to Mrs. Clark and Few. It was adjudged and decreed that there was due from Jeremiah Clark \$8,565.77; that he should be forever barred and foreclosed of any interest in the mortgaged premises, and that they should be sold by the marshal, and the proceeds applied to the payment of the amount found due. On the 27th of December, 1861, the marshal sold the premises to the complainant for \$7,000, and on the 23d of that month executed to him a deed for the property. That there was still due to the complainant upon the decree the sum of \$1,884.25, for the payment of which, the interest of Florinda Clark in the mortgaged premises is chargeable. That the defendant, Few, under a deed from Clark and wife to him in trust, claims to have the interest of a trustee in the property, which interest accrued subject to his mortgage. The prayer of the bill is for a decree of foreclosure as to the interest of Florinda Clark and Few in the mortgaged premises, and for general relief.

Few filed an answer which sets forth, that about the 12th of January, 1860, Clark and wife executed to him, in trust, a deed for the same premises described in the mortgage; that the persons for whose benefit the deed was made were Florinda Clark, the wife of Jeremiah Clark, and their children, then born and thereafter to be born, and the lawful heirs of such children, with certain limitations as to the further disposition of the property as set forth in the deed, a copy of which it is stated is annexed to the answer of Mrs. Clark to the amended bill in this case. As to all the other matters set forth in the bill, he avers that he had no knowledge, and he disclaims all interest in the matter in controversy, except as such trustee. He prays that the court will adjudge fairly between the parties in interest, and that he may be dismissed with costs.

Clark and wife failed to answer. The trust deed referred to in

the answer of Few, as made a part of the answer of Mrs. Clark, is not in the record. No replication was filed by the complainant, and no testimony was taken upon either side. The bill was taken *pro confesso* as to Clark and wife, and the case stood upon the bill and answer as to Few.

The court decreed that all the defendants should be forever barred and foreclosed of their right of redemption in the mortgaged premises. The decree does not find either the fact or the amount of the alleged indebtedness. It is silent upon the subject. The record shows no proceeding in relation to it. No time was given either to Mrs. Clark on her trustee within which to pay and redeem. The foreclosure was unconditional, and was made absolute at once. The appeal is prosecuted to reverse the decree.

In our view of the case it will be sufficient to consider one of the numerous objections insisted upon by the counsel for the appellants.

The sale and conveyance by the marshal transferred the entire interest of Jeremiah Clark in the mortgaged premises to Reyburn, but it did not in any wise affect the equity of redemption which had been vested in Few by the trust deed of Clark and wife to him. *Childs v. Childs et al.*, 10 Ohio St. 339. The equity of redemption would have been barred and extinguished by the decree which ordered the premises to be sold if the proper parties had been before the court when it was made. The bill in that case having been dismissed as to Mrs. Clark and Few, the proceedings left their rights in full force. They were before the court in the case now under consideration, and the trust estate was for the first time liable to be affected by its action. If there was a balance of the debt secured by the mortgage still unpaid, they were properly proceeded against, and the complainant was entitled to relief. The question to be considered relates to the character of the decree.

Can a decree of strict foreclosure, which does not find the amount due, which allows no time for the payment of the debt and the redemption of the estate, and which is final and conclusive in the first instance, be sustained?

The equity of redemption is a distinct estate from that which is vested in the mortgagee before or after condition broken. It is descendible, devisable, and alienable like other interests in real property. 1 Powell on Mortgages, 252; 2 Greenleaf's Cruise, 128. As between the parties to the mortgage the law protests it with jealous vigilance. It not only applies the maxim "once a mortgage

always a mortgage," but any limitation of the right to redeem, as to time or persons, by a stipulation entered into when the mortgage is executed, or afterwards, is held to be oppressive, contrary to public policy, and void. By the common law, when the condition of the mortgage was broken, the estate of the mortgagee became indefeasible. At an early period equity interposed and permitted the mortgagor, within a reasonable time, to redeem upon the payment of the amount found to be due. The debt was regarded by the chancellor, as it has been ever since, as the principal, and the mortgage as only an accessory and a security. The doctrine seems to have been borrowed from the civil law. 2 Greenleaf's Cruise, 77-78; Spence's Equity Jurisdiction, 601-603. After the practice grew up of applying to the chancellor to foreclose the right to redeem upon default in the payment of the debt at maturity, it was always an incident of the remedy that the mortgagor should be allowed a specified time for the payment of the debt. This was fixed by the primary decree, and it might be extended once or oftener, at the discretion of the chancellor, according to the circumstances of the case. It was only in the event of final default that the foreclosure was made absolute.

In this country the proceeding in most of the States, and perhaps in all of them, is regulated by statute. The remedy thus provided when the mortgage is executed enters into the convention of the parties, in so far that any change by legislative authority which affects it substantially, to the injury of the mortgagee, is held to be a law "impairing the obligation of the contract" within the meaning of the provision of the Constitution upon the subject. *Bronson v. Kinzie*, 1 Howard, 311; *Williamson v. Doe*, 7 Blackford, 13.

At the date of the execution of this mortgage the act of the territorial legislature of Kansas of 1855, "concerning mortgages," was in force. It directed that in suits upon mortgages the mortgagee should recover a judgment for the amount of his debt, "to be levied of the mortgaged property," and that the premises should be sold under a special fieri facias. But it also provided that nothing contained in the act should be so construed as to "prevent a mortgagee, or his assignee or the representative of either, from proceeding in a court of chancery to foreclose a mortgage according to the course of proceeding in chancery in such cases." Statutes of Kansas of 1855, p. 509. This gave to the complainant in the case before us the option to proceed in either way. He elected to file a bill in equity. No rule of practice bearing upon the sub-

ject, established by the court below, has been brought to our attention.

The 90th rule of equity practice adopted by the Supreme Court, directs that where no rule prescribed by this court, or by the Circuit Court, is applicable, the practice of the Circuit Court shall be regulated by the practice of the High Court of Chancery in England, so far as it can be applied consistently with the local circumstances and convenience of the district where the court is held.

The equity spoken of in the Process Act of 1792, is the equity of the English chancery system. *Robinson v. Campbell*, 3 Wheaton, 212; *Boyle v. Zacharie*, 6 Peters, 648.

Spence says: "At length, in the reign of Charles I, it was established that in all cases of mortgages, where the money was actually paid or tendered, though after the day, the mortgage should be considered as redeemed in equity as it would have been at law on payment before the day; and from that time bills began to be filed by the mortgagees for the extinction or foreclosure of this equity, unless payment were made by a short day, to be named." Equity Jurisdiction, 603.

The settled English practice is for the decree to order the amount due to be ascertained, and the costs to be taxed; and that upon the payment of both within six months, the plaintiff shall reconvey to the defendant; but in default of payment within the time limited, "that the said defendant do stand absolutely debarred and foreclosed of and from all equity of redemption of and in said mortgaged premises." 2 Daniels' Chancery Practice, 1016; 1 Seton on Decrees, 346. We have been able to find no English case where, in the absence of fraud, a time for redemption was not allowed by the decree. The subject was examined by Chancellor Kent, with his accustomed fulness of research. He came to the conclusion that the time was in the discretion of the chancellor, and to be regulated by the circumstances of the particular case; but he nowhere intimates that such an allowance could be entirely withheld. *Perine v. Dunn*, 4 Johnson's Chancery, 140. The practice in Illinois is in conformity to these views. *Johnson v. Donnell*, 15 Illinois, 97. In the light of these authorities we are constrained to hold the decree in the case before us fatally defective.

The decree is reversed, and the cause will be remanded to the court below for further proceedings,

In conformity to this opinion.

(b) Foreclosure by Entry

BOYD v. SHAW

SUPREME JUDICIAL COURT OF MAINE, 1836

(14 Me. 58)

THIS was a bill in equity, and was heard on bill, answer, and proof. The bill alleged, that William Boyd was seized of a tract of land in Bangor, and on the 3d of December, 1813, mortgaged the same to the defendant, to secure the sum of \$286.37, payable in six months, with interest; and that on the 8th of August, 1815, the said William Boyd made a second mortgage of the same land to Philip Coombs and Richard Pike, to secure the payment to them of the sum of \$321.59 in one year with interest; that on the 4th of June, 1835, Coombs and the administratrix of Pike assigned their mortgage to the plaintiff; that the plaintiff, as assignee of the Coombs & Pike mortgage, on the seventh of the same June, tendered to Shaw the amount due on his mortgage to redeem the same; and that Shaw refused to receive the money, or give a quitclaim deed, and wholly denied any right to redeem.

The answer denied that any right of redemption existed at the time of the alleged tender; that on the 9th of April, 1816, "he entered upon the premises and took peaceable possession thereof according to law, by virtue of said mortgage deed, and for the express purpose of foreclosing the right in equity of redeeming the same, and that said William Boyd was then present, and had full knowledge of such entry to foreclose, and gave his written assent thereto;" that he has ever since, by himself and tenants, peaceably, openly, and exclusively occupied, possessed, and improved the same; and that the said Coombs, Pike, and Robert Boyd well knew the same. The defendant also set up title to the premises, by virtue of a Collector's sale for the payment of taxes; but, as this part of the case is not noticed in the opinion of the Court, any reference to it has become unnecessary. The facts in the case sufficiently appear in the opinion of the Court.

WESTON, C. J.—The principal question submitted to us is, whether there has been a foreclosure of the mortgage, executed by William Boyd, from whom both parties claim, to the defendant. From the date of that mortgage, which was in December, 1813,

until 1821, when the statutes were revised, the rights of the parties are to be determined by the laws of Massachusetts, then existing. By the statute of 1785, ch. 22, 1 Mass. Laws, 251, all real estates pledged or mortgaged are declared redeemable, unless the mortgagee, or person claiming under him, hath by process of law, or by open and peaceable entry, made in the presence of two witnesses, taken actual possession thereof, and continued that possession peaceably three years. By the additional statute of 1798, ch. 77, 2 Mass. Laws, 853, it is provided, that where the mortgagee has lawfully entered, and obtained the actual possession of the mortgaged premises, for condition broken, the mortgagor shall have a right to redeem the same, within three years next after such possession obtained, and not afterwards. And a process is provided by a bill in equity, whereby upon payment or tender made, within the period limited, he is to be restored to the enjoyment of the premises.

It is contended, that by lawful entry under the last statute, must be understood one made peaceably, in the presence of two witnesses, or obtained by process of law, according to the provisions of the former statute. There does not seem to be any sufficient reason, why the term, "*lawful entry*," should receive so narrow a construction. Any peaceable entry made by the mortgagee, upon a surrender to him of the premises, or otherwise, would be lawful.

These statutes have frequently been under consideration in the Supreme Court of Massachusetts. In *Earskine v. Townsend*, 2 Mass. R. 493, it was stated by the Court, that if the mortgagee shall lawfully enter and take possession, after condition broken, the three years will commence from the time of such entry. But if he have entered before, they do not commence, until he shall have given notice to the mortgagor, after condition broken, that he holds for that cause. What shall constitute a lawful entry is not defined, but a mode of foreclosure is expressly recognized, not pointed out by the first statute, namely, by notice to the mortgagor. *Newall et al. v. Wright*, 3 Mass. R. 138, has the same doctrine. PARSONS, C. J., there says "when the mortgagor enters after condition broken, the three years commence on that entry."

In *Taylor v. Weld et al.*, 5 Mass. R. 109, it was stated by SEDGWICK, J., who delivered the opinion of the Court, that an entry, after condition broken, shall be understood to be for that cause. In that case it was held by the Court, under the statute of 1789, ch. 77, that the three years begin to run, from the time the mort-

gagee shall have made lawful entry for condition broken; and that to effect a foreclosure, it was no longer necessary, as was required by the former statute, that he should enter by process of law, or make open and peaceable entry in the presence of two witnesses. In *Pomeroy v. Winship*, 12 Mass. 514, PARKER, C. J., says, "It has already been decided that, where the mortgagee shall enter after condition broken, it shall be presumed that he entered for that cause; and the time for foreclosure shall run from that entry." The generality, however, of this intimation has been modified by subsequent decisions.

In *Thayer et al. v. Smith*, 17 Mass. R. 429, the court held, that the entry must be open and peaceable and actual possession taken, that the mortgagor may know when the three years commence, beyond which his right to redeem will cease; and that nothing short of actual notice to the mortgagor will supply the want of a continued possession. The same doctrine was laid down in *Gibson v. Crehore*, 5 Pick. 146, and in *Hadley et ux. v. Houghton*, 7 Pick. 29.

We are warranted then in deducing from the law of Massachusetts, as settled by judicial construction, that to effect a foreclosure by proceedings *in pais*, the mortgagee is to make lawful entry for condition broken, of which the parties to be affected must have actual or implied notice; and that notice is to be implied from a subsequent continued possession.

The entry of the mortgagee proved in this case, was after condition broken. The defendant entered lawfully for that cause and for the purpose of foreclosure, as appears by the consent in writing of William Boyd, the mortgagor, who had continued in possession up to that period. From that time, Boyd considered the land the property of the defendant, and his right was frequently recognized by Coombs, who became second mortgagee jointly with Pike. The first mortgage was recorded; Coombs knew of its existence; and Boyd, who was left in possession, and who acknowledged under his hand the entry of the defendant for condition broken, was for many years his near neighbor. Coombs found that the defendant had taken possession, after the date of the second mortgage to him.

He now states, that he neither knew or suspected that he did so for the purpose of foreclosure. It is somewhat remarkable, that interested as he was in the property, such a suspicion should not have entered his mind, during the years that the mortgagee had the possession and control of the land by his agents. If he had given himself the trouble to inquire, he might have ascertained the

fact from his neighbor Boyd, the mortgagor. If he did not know when the first mortgage was payable, he might have known upon inquiry, which as second mortgagee he was bound to make, the note being referred to in the first deed of mortgage, which was duly recorded.

He stated to Jason Comings, in 1828, that he had occupied the land for paying the taxes a few years, under the defendant. It appears, both from the testimony of Comings and of John Bennock, the agent of the defendant, that about that time Coombs applied to him to hire the land, claiming a preference from his former occupancy; and because it was contiguous to his own land. And he was accordingly permitted to continue his occupancy. In his communications with Bennock, he uniformly spoke of this land as belonging to the defendant. It appears that he repeatedly proposed to buy it; and that he had once or twice offered for it, to the defendant or his agents, a sum exceeding the amount originally due to the defendant with the interest.

It has been satisfactorily established in proof, that in 1816, the defendant made peaceable and lawful entry into the premises for condition broken. That for several years prior to 1828, and for several years afterwards, being more than three years in the whole, he was in the continued possession by his agent, or by his tenant, Coombs. The entry and possession of the mortgagee, after and for condition broken, is implied, if not actual, notice to all persons interested in the equity of redemption. But if it is incumbent upon the defendant to prove affirmatively notice of his entry to the second mortgagee, it is abundantly proved that Coombs had such notice; and he ought to have known, and might have known, that it was for condition broken. And the plaintiff is affected with this notice, holding as he does under Coombs, by deed dated a few days only before the commencement of this suit.

From the facts in the case, we are satisfied that the right to redeem, now attempted to be asserted, was foreclosed prior to 1821, under the laws of Massachusetts. The defendant had lawfully entered and taken possession for condition broken, by the consent in writing of the mortgagor, Boyd, who was then in the actual possession, with the equitable right to redeem from both the incumbrancers. The second mortgagee became the tenant of the defendant for more than three years since the revised statute of 1821, fully acknowledging the defendant's title. If then the equity was not foreclosed before, as we think it was, if the case required it, there is much reason to hold, that there may have been

a foreclosure under the statute of this State. But upon this point we give no decided opinion. The entry of the defendant for condition broken, having been lawfully made prior to 1821, the law of Massachusetts must govern the case.

It has been contended in argument, that the right to redeem is a favored claim. But the extent and limit of the favor due to it, have been fixed by law. This we are not at liberty to transcend. It is very manifest, that the movement to redeem had its origin in the very great and sudden appreciation of the land in value. The plaintiff's grantor, a man of ample means, had slumbered upon the claim now set up, for twenty years. He was under no obligation to pay the debt due to the defendant. For the greater part of that period, it was doubtful whether the value of the land was equal to that debt. If it had depreciated, the loss would have fallen upon the defendant; and it is but just that the chance of gain should be accorded to him, who runs the hazard of the loss.

Bill dismissed.¹

THOMPSON v. KENYON

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1868

(100 Mass. 108)

BILL IN EQUITY to redeem real estate from a mortgage given by the plaintiff to David Heywood. Answer, that the right of redemption was foreclosed. Issue was joined on the answer, and a hearing had before COLT, J., who reserved the case for the determination of the full court on a report of which the following is the material part:

"It appeared that the mortgage was given by the plaintiff June 25, 1850, and assigned by Heywood to Jonathan Fawcett May 24, 1851. To prove a foreclosure the defendant relied upon a certificate indorsed upon the back of the mortgage deed as follows:

"I, Jonathan Fawcett, the assignee of the mortgage, the conditions of the within mortgage being broken, this day entered upon the premises and took peaceable possession for conditions broken, and for the purpose of foreclosing this mortgage.

"JONATHAN FAWCETT.

¹ See also, *Ladd v. Putnam*, 79 Me. 568 (1887).

"We, the undersigned, hereby certify and swear that Jonathan Fawcett, the assignee of the within mortgage, this day entered upon the premises described and referred to in the within deed, and then in our presence declared that he took peaceable possession of the premises for conditions broken and for the purpose of foreclosing the mortgage. Witness our hands and seals, the 11th day of April, 1857.

"In presence of
ISRAEL CUTTING,
CHARLES HERSEY.

EDWIN R. WALKER. [Seal.]
his
ELGIN X BARKER. [Seal.]
mark.

"Sworn to before me, Charles Hersey, Just. Peace."

"This certificate was duly recorded; and was held by me, it followed by the statute possession, to be legally sufficient to foreclose said mortgage. The plaintiff remained in actual occupation of the premises from the date of the entry by Fawcett until the date of the conveyance by Fawcett to the defendant; but there was no evidence that his occupation was not in subordination to Fawcett's title under the mortgage. After the conveyance to the defendant, the plaintiff occupied a part of the premises under the defendant. The plaintiff filed a bill April 10, 1860, against said Fawcett, to redeem the premises, which was duly served, but no appearance was entered by Fawcett and no further proceedings were had therein, and the suit was entered 'neither party,' at April term 1861, at the instance of the plaintiff. Fawcett conveyed the mortgaged premises to the defendant October 29, 1860, by quitclaim deed in the ordinary form, duly recorded. The consideration for this conveyance was the amount due on the mortgage, principal and interest, which was then paid by the defendant. At the same time, the mortgage note was indorsed to the defendant without recourse. At the time of the conveyance from Fawcett, the defendant held a second mortgage on the premises, given by the plaintiff, dated February 26, 1855, and duly recorded.

"The plaintiff, in avoidance of the alleged foreclosure, contended, 1, That, after the expiration of the three years for redemption, but during the pendency of the bill to redeem of Fawcett, the defendant took up the first mortgage at the plaintiff's request, and agreed with him at the time of the conveyance from Fawcett to allow further time for redemption; 2, that such agreement to extend the time of redemption was, at all events, made by the defendant before said bill to redeem was dismissed; and 3, that at the time of Fawcett's deed the defendant had actual knowledge of

the attempted foreclosure, and also of the pendency of the bill to redeem. The defendant denied each of these allegations; and there was much conflict of evidence under them. The plaintiff contended that the burden of proof to establish the foreclosure was upon the defendant; and I so ruled. But I was of opinion that the burden of establishing the above propositions was upon the plaintiff; and upon the whole evidence was not satisfied that either of the propositions was proved. The plaintiff, notwithstanding, insisted that upon the uncontroverted facts he was still entitled to redeem."

FOSTER, J. Under the statutes providing for the foreclosure of a mortgage by open and peaceable entry on the mortgaged premises and possession thereof continued peaceably for three years, an entry is peaceable if not opposed by the mortgagor or person claiming the premises, and sufficiently open if made in the presence of two competent witnesses whose certificate thereof is sworn to and duly recorded within thirty days in the registry of deeds for the county where the land lies. Gen. Sts. c. 140, §§ 1, 2. The certificate is not in terms required to state that the entry was open; and it is enough that it states in the present case that it was in the presence of the two witnesses. The signature of a markaman was sufficient in this case, as in all others, even the attestation of a will.

The mortgagor, the plaintiff, just before the three years' possession expired, filed a bill to redeem against Fawcett, the assignee of the mortgagee, and the one by whom the entry had been made; pending this bill Fawcett assigned his interest to the defendant by quitclaim deed; subsequently that suit was abandoned by the entry of "neither party." The conveyance *pendente lite* did not affect the suit in equity to redeem. When that was discontinued, the defendant succeeded to all Fawcett's rights, and held the estate by an indefeasible title under a completed foreclosure. We discover no foundation for the suggestion that Fawcett's conveyance to the defendants was a release either of the mortgage or its foreclosure. It was an assignment of the mortgage, and of all Fawcett's rights under it.

The certificate of the entry is made by statute evidence of the fact. *Oakham v. Rutland*, 4 Cush. 172.

*Bill dismissed.*¹

¹ And see, *Thompson v. Ela*, 58 N. H. 490 (1878).

(c) *Foreclosure under Power of Sale*

VERY v. RUSSELL

SUPREME COURT OF NEW HAMPSHIRE, 1874

(65 N. H. 646)

TRESPASS *qu. cl.* The parties agreed upon the following facts for the opinion of the court:

October 29, 1863, the plaintiff, being the owner of the *locus in quo*, made a mortgage thereof to one Cole, in which her husband joined, to secure a note for \$1,000. Immediately succeeding the condition in the mortgage was the following: "And it is agreed that on failure of performance of said condition, the said John Cole may advertise said mortgaged premises for sale, by publication of notice in some newspaper printed at Keene, in said county, three weeks successively before such sale, and may sell the same at public auction to the highest bidder; and his deed thereof, in pursuance of such sale, shall convey to the purchaser an indefeasible title to the same, discharged of all rights of redemption by the mortgagors or any person claiming under them. And the mortgagee shall apply the proceeds of said sale in payment of said mortgage debt, and pay over the balance, if any, to the mortgagors, after deducting the expense of notice and sale."

Payment not being made according to the condition of the mortgage, Cole caused the premises to be advertised and sold in accordance with the above stipulation in the mortgage. The sum for which the premises sold was less than the amount then due on the mortgage. One Shaw, the agent and attorney of Cole, bid off the premises at the auction, but he was, in fact, acting for Cole in the business. Afterwards, Cole, by quitclaim deed, conveyed the premises to Shaw, and Shaw thereupon, for a valuable consideration, conveyed them to the defendant. The defendant subsequently went upon the land and cut wood and timber, for which acts this suit is brought.

FOSTER, J. The defendant claims title to the premises and property, which are the subject of the alleged trespass, by virtue of a valid execution of the power of sale contained in the plaintiff's mortgage to Cole.

The validity of such powers is very generally, if not universally,

recognized and declared by the text writers on both sides of the Atlantic, who adduce abundant authorities in support of their propositions. The doctrine seems to rest upon a principle no less broad and fundamental than the right of parties to make for themselves such legal contracts as they choose. 1 Wash. R. P. 498, and cases cited.

In *Bell v. Twilight*, 22 N. H. 500, 515, PERLEY, J., says,—“It may admit of doubt whether such powers to sell, granted in mortgages, are valid under our statutes, which define and fix the right of redemption, and provide easy and prompt methods of foreclosure.” But we are unable to see upon what ground, in the absence of legislative prohibition, the court can put a restriction upon the freedom of the citizen to contract for the sale of his land, upon terms and in a mode stipulated in a mortgage, any more than upon his liberty to contract for its sale in any other way, or by stipulations contained in any other instrument.

The validity of such a power has been very generally affirmed in the other states of the Union. It is recognized in every other New England state, although in no one of them is it declared by express statute. Rhode Island and Massachusetts make statutory recognition of it, the latter by prescribing regulations for the proceedings at such sale, and the former by declaring that at an auction sale under a power contained in the mortgage the mortgagee may himself be the purchaser. Maine, Vermont, Massachusetts, and Connecticut, like our own state, have each provided other statutory methods of foreclosure, thus in effect declaring that those other methods are not provided and intended as a repeal or abrogation of the common law in this respect. See *Kinsley v. Ames*, 2 Met. 29; *White v. Brown*, 2 Cush. 412; *Roarty v. Mitchell*, 7 Gray, 243; *Capron v. Attleborough Bank*, 11 Gray, 492; *Smith v. Provin*, 4 Allen, 518; *Montague v. Dawes*, 12 Allen, 397; *Wing v. Cooper*, 37 Vt. 183; *Walthall v. Rives*, 34 Ala. 91; *Simson v. Eckstein*, 22 Cal. 590; *Mitchell v. Bogan*, 11 Rich. 686; *Bradley v. Chester Valley R. R. Co.*, 36 Pa. St. 141; *Hyman v. Devereaux*, 63 N. C. 624; *Bloom v. Van Rensselaer*, 15 Ill. 503.

Doubtless the power ought not to be recognized in any case, unless it is conveyed by an express grant and in clear and explicit language; and its execution should be jealously watched and declared void for the slightest unfairness or excess, or for anything that prevents competition. But the legal power of the parties to make such a contract must, we think, be upheld; and when, in carrying it out, the above essential conditions are fairly fulfilled,

the sale must be held to divest the mortgagee of all his rights in the premises.¹

Was the execution of the power in this case legal and effectual? We think not, for the reason that the mortgagee, through Shaw, was the purchaser at the sale. The cases are numerous where it is held that if a person intrusted to sell property shall, directly or indirectly, become himself the purchaser, the sale is, *ipso facto*, so far a fraud that any one interested in it as *cestui que trust* may avoid it at his election. It is said that if the mortgage contains a power of sale, the mortgagee becomes a *quasi* trustee for the mortgagor, and he cannot purchase, or if he does he becomes a constructive trustee. Per. Tr., s. 199; 1 Wash. R. P. 500; Snell Eq. 379. Such seems to be the weight of authority, though it has been held in some cases that such sale can only be impeached by showing actual fraud. *Richards v. Holmes*, 18 How. 143, is such a case; —and see *Lyon v. Jones*, 6 Humph. 533; *Edmonson v. Welsh*, 27 Ala. 578; *Benham v. Rowe*, 2 Cal. 387; *Roberts v. Fleming*, 53 Ill. 196; *Griffin v. Marine Co.*, 52 Ill. 130.

We think it would be dangerous, even when no actual fraud is shown, to hold the sale valid in such cases, and that the safer course is to discourage every appearance or suspicion of fraud by adopting strictly the rule as above expressed, that a purchase of the mortgaged estate by the mortgagee must, as to the mortgagor, be regarded as *ipso facto* fraudulent and void.

The defendant claims that in case the sale should be held invalid as between mortgagor and mortgagee, his situation then becomes that of a mortgagee in possession, and therefore that this action of trespass will not be against him for acts done on the premises while so in possession. This position cannot be sustained. The quitclaim deed from Cole to Shaw passed no interest in the mortgage or in the land, because there was no transfer of the debt secured by the mortgage.

There is another ground, however, upon which the defendant's title must be upheld. So far as the case shows, he stands in the position of an innocent purchaser for value, with no notice or knowledge of the fault in the sale, and nothing to put him upon inquiry. That being so, it is a well and long established rule, that he is to be protected in his title according to the legal interpretation of the instrument of conveyance by which he holds. *Harrison v. Forth*, 1 Eq. Cas. Abr., Notice, A. 6, p. 331, A. D. 1695. Or,

¹ See, *First Nat. Bank v. Bell Silver & Copper Min. Co.*, 8 Mont. 32 (1888).

as Judge Story expresses it, "If a person who has notice sells to another who has no notice, and is a *bona fide* purchaser for a valuable consideration, the latter may protect his title, although it was affected with the equity arising from notice in the hands of the person from whom he derived it." 2 Sto. Eq. Jur., s. 1502; Snell Eq. 66; Sm. Eq. 17; 2 Sug. Vend. (8th Am. ed.) 753, and note *g*; 2 Dan. Ch. 773; Ad. Eq. 37, 273; Hill. Vend. 408; 4 Kent Com. 179; 1 Par. N. & Bills, 216; 2 ditto, 26; Sto. Pr. Notes, s. 191; *Smith v. Hiscock*, 14 Me. 449; *Hascall v. Whitmore*, 19 Me. 102; *Piper v. Hilliard*, 52 N. H. 209, 211; *Hood v. Fahnestock*, 8 Watts, 489; *Atwater v. Seymour*, Bray. 209; *Stevens v. Morse*, 47 N. H. 532, 537.

The application of this doctrine to the relief of the defendant is not likely to work any serious hardship to the plaintiff. The purchase-money derived from the auction sale is an extinguishment *pro tanto* of the plaintiff's indebtedness to Cole. If the property sold for its fair value, and the sale was made without actual fraud, the plaintiff has not been wronged. If she has been in fact defrauded by Cole, she has her remedy against him in an action for the damages occasioned by the fraud. And even if she should fail in that remedy by reason of the inability of Cole to respond in damages, it would seem that she should suffer the loss rather than the defendant who is equally innocent, because, by granting to Cole the right to sell, she put it in his power to work the injury through the execution of that power.

Case discharged.

HADDINGTON ISLAND QUARRY COMPANY, LIMITED, v. HUSON

PRIVY COUNCIL, ON APPEAL FROM THE COURT OF APPEAL OF
BRITISH COLUMBIA, 1911

(L. R. [1911] A. C. 722)

LORD DE VILLIERS.¹ This is an appeal against a judgment of the Court of Appeal of British Columbia reversing a judgment of Morrison, J., in the Supreme Court, which dismissed the plaintiffs' action with costs. The plaintiffs were the mortgagors and personal representatives of mortgagors of a certain quarry known as Haddington Island, and the defendants were the assignees of

¹ Portion of opinion omitted.

the mortgage and purchasers of the quarry, the sale to the latter having been effected by virtue of a power of sale conferred on the mortgagees by the indenture of mortgage. The statement of claim contained several claims, but the claims to which the arguments before their Lordships were mainly directed were for a cancellation of the conveyance to the purchasers, and for a declaration that the plaintiffs were entitled to redeem the mortgage.

The real question, therefore, to be decided in this appeal is whether, in view of the pleadings and of the evidence given at the trial, the Court of Appeal rightly decided that there was such a reckless disregard of the interests of the mortgagors as would justify the setting aside of the sale.

The parties against whom the action was brought were not only the assignees of the mortgage, but also the purchasers of the property. The sale was effected by virtue of a power which is in the following terms: "If the mortgagors make default as to any of the covenants or provisos herein contained, the principal hereby secured shall, at the option of the mortgagee, his heirs or assigns, forthwith become due and payable, and in default of payment the powers of sale hereby given may be exercised. Provided that the said mortgagee, on default of payment for one month, may, on one month's notice, enter on and lease or sell the lands. And provided also that, in case default be made in payment of either principal or interest for two months after any payment of either falls due, the said powers of leasing or selling or any of them may be acted upon without any notice. . . . Provided that, in default of the payment of the interest hereby secured, the principal hereby secured shall become payable." Ostensibly, therefore, the mortgagees acted within their powers in selling the property, and the purchasers are entitled to the full benefit of their purchase unless it be alleged and proved that they acted in collusion with the vendors, or that the price was so low as in itself to be evidence of fraud or collusion. Unfortunately, from first to last there is no allegation in the statement of claim charging the purchasers with fraud or collusion or bad faith or knowledge of the existence of facts which would invalidate the sale. The allegations that the defendant company, that is to say, the vendors, did not use any exertions to obtain the best price for the land, and that they sold it to the purchasers at a very inadequate price, are quite consistent with perfect good faith on the part of the purchasers, and yet these are the only allegations from which it could possibly have been inferred that at the trial attempts would be made to charge them

with collusion or want of good faith. At the trial the evidence was mainly directed towards establishing those grounds of claim which have since been practically abandoned. Incidentally, Alden Huson, one of the plaintiffs, was asked what the value of the property was, and his answer was: "Well, it is worth at least \$20,000, at the very least. We were offered \$30,000 for it once." As this amount is far in excess of the price for which the property was sold, namely, \$3,250, it is contended that the sale should not be allowed to stand, but, in the absence of any notice to the defendants that the alleged inadequacy of price would be relied upon as proof of fraud or collusion on their part, they should not be prejudiced by their failure to produce counter-evidence as to value. The evidence as to value given on behalf of the plaintiffs was of the most flimsy nature. Huson said that they had been offered \$30,000 for the quarry, but did not produce the person who had made the offer. Nor did the plaintiffs produce any expert, or indeed any other, evidence in support of Huson's casual statement as to value. If the property was so valuable early in 1908, there is no satisfactory explanation why it was not sold and the proceeds of the sale applied towards redemption of the mortgage. It is clear from the correspondence that as far back as January, 1908, Huson knew that there was a prospect of the property being immediately sold for the amount of the original mortgage debt, but, although he protested against such a sale, he made no attempt to find the means of paying the Government the sum of \$1,150, which was all that was then still owing for principal and interest. Under the indenture of mortgage the mortgagors were at liberty to pay the debt after three months' notice in writing to the mortgagee or his assigns, or upon the payment of three months' interest in lieu of notice. No such notice appears to have been given, nor interest tendered either to the Government or to the defendant company after it had, in March, 1908, obtained from the Government an assignment of the mortgage. The defendant company accordingly sold the property for \$3,250, and it now holds the balance, after payment of capital and interest, at the disposal of those entitled thereto. The trial judge was perfectly satisfied as to the validity of the transaction. In the notice of appeal to the Court of Appeal, although other grounds of alleged invalidity are fully stated, not a word is said as to fraud or collusion, but the Court held, in effect, that the sale was fraudulent. Among the cases cited by Galliher, J., was that of *Warner v. Jacob*, (1882), 51 L. J. (Ch.) 642, where Kay, J., summing up the authorities,

is reported to have said: "The result seems to be that a mortgagee is, strictly speaking, not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his mortgage debt. If he exercises it *bona fide* for that purpose, without corruption, or collusion with the purchaser, the Court will not interfere, even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud." In the present case the statement of claim alleged, in effect, that the sale was very disadvantageous, but it gave no hint to the defendants that they would be called upon at the trial to meet a charge of either corruption or collusion, or to meet the case that the price was so low as in itself to be evidence of fraud. Under these circumstances, their Lordships are unable to attach the same importance as was attached by the Court of Appeal to the circumstance that the defendants produced no evidence as to the value of the property, nor are they prepared to dissent from the finding on the facts by the learned judge at the trial. They will therefore humbly advise His Majesty that the judgment of the Court of Appeal should be reversed and the judgment of Morrison, J., restored. The respondents will bear the costs of this appeal and the costs incurred in the Court of Appeal and the Supreme Court.¹

CLARK v. SIMMONS

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1890

(150 Mass. 357)

BILL IN EQUITY, filed in the Superior Court, to redeem land in Hanson from several mortgages. Hearing before HAMMOND, J., who found the following facts:

Edwin J. Brewster, who then owned the land in question, successively gave four mortgages thereof to Martin Howland, the last of which was dated June 27, 1884, the first three, which were duly recorded before December 1, 1884, being for two hundred and fifty dollars each, and the fourth, which was not recorded until December 8, 1884, being for one hundred and fifty dollars. On

¹ A mortgagee foreclosing by advertisement is regarded in equity as in the nature of a trustee and is bound to conduct the proceedings

in a fair and just manner and in good faith. *Soule v. Ludlow*, 3 Hun. (N. Y.), 503 (1875).

August 30, 1884, Brewster executed a fifth mortgage, which was duly recorded on December 1, 1884, for two hundred and fifty dollars to the plaintiff, who then knew that the land was mortgaged for the aggregate amount of the four prior mortgages, but covered as he supposed by one mortgage; and he did not become aware of the existence of the second and third mortgages until he recorded the fifth mortgage on December 1, 1884, and he did not know of the existence of the fourth mortgage until the land was subsequently sold under the first mortgage. Afterwards the defendant, who had been duly appointed assignee in insolvency of Brewster, took an assignment in his individual capacity of the first four mortgages from Howland, at a time when there was a breach of condition of the first mortgage. At that time the plaintiff asked the defendant to notify him when he should take action looking to a sale. The defendant duly advertised the land for sale on September 1, 1888, on the premises, under the first mortgage, in a newspaper which satisfied the terms of the mortgage. On that day the defendant was ill, and, no bidders being present, the sale was adjourned by order of the defendant, and the auctioneer orally proclaimed an adjournment to the same place on a future day named. The sale was afterwards adjourned several times, in the same manner and for the same reason, and finally until November 24, 1888, at nine o'clock in the forenoon.

On November 23, 1888, the defendant wrote a letter and mailed it to the plaintiff, stating that the premises would be sold on the next day, but without stating the hour or the place. This letter by the usual course of mail reached the plaintiff's post-office at seven o'clock in the evening on the same day, but the plaintiff did not get it until nine o'clock on the same evening. On the morning of November 24, the plaintiff made inquiries of the people near the premises, but could gain no information as to the time or place of the sale. The plaintiff did not take or see the newspaper in which the original advertisement appeared, and no copy of the advertisement was at any time sent to him, and he was ignorant of the proposed sale until he received the defendant's letter. There was no notice of the time and place of the adjourned sales, except the successive oral proclamations of the auctioneer, and no notice of any kind was ever posted upon the premises, and no one was present at any time except the auctioneer and the agent of the defendant. On that morning the auctioneer and the defendant's agent reached the mortgaged premises about twenty minutes before the time fixed for the sale, and at nine o'clock,

there being no other persons present, the land was purchased by the defendant, through his agent, for twelve hundred dollars, which amount was at least two hundred dollars less than its fair market value.

The judge made a decree that the first four mortgages were valid as against the plaintiff; that the sale under the power in the first mortgage was invalid; and that the plaintiff was entitled to redeem upon paying what was due upon such mortgages; and reported the case for the determination of this court.

The case was argued at the bar in October, 1889, and afterwards was submitted on the briefs to all the judges, except MORTON, C. J.

KNOWLTON, J. On the facts found, the plaintiff does not attack that part of the decree which adjudges that the fourth mortgage of Brewster to Howland, assigned to the defendant, is good against the plaintiff, and the only question before us arises on the defendant's contention that the sale made by him under the power contained in the first mortgage is valid.

It has repeatedly been held in this Commonwealth, and elsewhere, that a mortgagee who attempts to execute a power of sale contained in the mortgage is bound to exercise good faith, and to use reasonable diligence to protect the rights and interests of the mortgagor under the contract. *Montague v. Dawes*, 14 Allen, 369; *Drinan v. Nichols*, 115 Mass. 353; *Thompson v. Heywood*, 129 Mass. 401; *Briggs v. Briggs*, 135 Mass. 306. If he fails to do his duty in this respect, a mere literal compliance with the terms of the power will not render the sale valid against the mortgagor in favor of one charged with knowledge of the delinquency, although it may be sufficient if the purchaser is a stranger who buys in good faith. In determining whether, in a particular case, a mortgagee has acted in good faith and with a due regard for the interests of the mortgagor, the nature of his authority must be considered. He has a right, after giving the prescribed notices, to have the mortgaged property sold by auction for the payment of his debt. It is his duty, for the benefit of the mortgagor whom he represents, so to act in the execution of the power as to obtain for the property as large a price as possible. Ordinarily the parties stipulate in the mortgage what kind of notices of the sale shall be given, and ordinarily a mortgagee is not required to give a notice of a different kind; so far as the mortgage leaves him a power of selection of methods of giving notice and of making the sale, he is to act

reasonably and exercise a sound discretion. The contract implies that, upon the notice prescribed, an auction sale can be had; that is, that bidders will be attracted so that the property can be sold. A sale by auction necessarily involves the presence of one or more persons who are willing to buy. If the notices given fail to bring such, a power to sell by auction cannot be executed. If the mortgagee is not authorized to purchase, and no bidders are present, it is quite obvious that no sale can be made. And if the only person present who will buy at all will offer only a small part of the well-known value of the property, the conditions which, under the contract, are impliedly essential to the execution of the power are wanting, and it is the duty of the mortgagee either to abandon his attempt to sell or to adjourn the sale until he can obtain the presence of bidders. Good faith and a reasonable regard for the interests of the mortgagor will not permit him to make a sale, when no one will offer a price which an owner could reasonably think of accepting if he were obliged to sell the property at a day's notice for what it would bring. In such a case, where the notices given have failed to accomplish the purpose which they contemplated that they would accomplish, it is the duty of the mortgagee, if he would make a sale, properly to represent, not only his own right to have the estate sold for his benefit, but also the right of the mortgagor to have an auction sale, such as both parties must be presumed to have contemplated by their contract, and to get for the property as much as it can reasonably be made to bring. Under such circumstances he should do what a reasonable man would be expected to do to accomplish that result. A failure to do that would be evidence of a want of good faith, and such a neglect, without an active purpose to defraud, would invalidate the sale, unless it was made to a stranger who bought in good faith.

In the case at bar, there were no bidders present at the time and place appointed for the sale, and the sale was adjourned then and several times afterwards, no one at any time being present except the auctioneer and an agent of the defendant, and no notice of any adjournment being given except by proclamation at the time by the auctioneer. Finally the estate was sold, nearly three months after the time named in the original notice, the plaintiff never having heard of the proceedings until nine o'clock in the evening of the day before the sale, and having merely received a letter which gave the day without stating the hour or place of the sale, and having been unable upon inquiry in the neighborhood to learn anything about it. The mortgagee bought the property for at

least two hundred dollars less than its fair market value. The plaintiff had requested the defendant to notify him when he should take action looking to a sale.

Under these circumstances, we think the defendant failed to do that which the exercise of good faith and the use of proper diligence required of him for the protection of the plaintiff's interests. At the time of each adjournment, there was no probability that anyone would come on the day to which the sale was adjourned. No one but the auctioneer and the defendant's agent, so far as appears, knew of any adjournment, and no notice was given to anybody of the time fixed for the sale which was finally made. We cannot infer that notice to the plaintiff and a reasonable effort to notify others would have failed to procure the attendance of bidders at the times fixed by the adjournments.

If such effort had failed to induce the attendance of any one, upon what terms the defendant could have purchased, without being chargeable with bad faith, it is unnecessary to decide. Inadequacy of price will not invalidate a sale, unless it is so gross as to indicate bad faith, or a want of reasonable judgment and discretion in the mortgagee. *Horsey v. Hough*, 38 Md. 130; *Learned v. Geer*, 139 Mass. 31.

Decree affirmed.

TAYLOR v. WEINGARTNER

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1916

(223 Mass. 243)

CROSBY, J.¹ The plaintiff on December 6, 1911, purchased from the defendant certain real estate situated in Boston. The premises were sold subject to a first mortgage thereon of \$10,000. The defendant, in addition to the conveyance of the real estate, paid the plaintiff \$1,200 in cash and received in return a deed of certain lots of land in Brighton, in the city of Boston, and a note for \$3,700 secured by a second mortgage on the real estate so conveyed to the plaintiff. This mortgage contained a power of sale in the usual form, one of its provisions being that the mortgagor "shall pay all taxes and assessments to whomsoever laid or assessed, whether on the granted premises, or on any interest therein."

About a year after the transactions above referred to, the plain-

¹ Portion of opinion omitted.

tiff sold the real estate to one Ambler subject to the two mortgages, there being at that time \$3,400 unpaid upon the second mortgage. Shortly afterwards Ambler sold the premises to one Fulton subject to the first and second mortgages, and on March 29, 1913, Fulton sold the premises to one Nickerson subject to the first and second mortgages. At that time \$3,300 remained unpaid on the second mortgage; no instalments of principal or interest on the note secured by the second mortgage were then due, but the taxes assessed on the property as of April 1, 1912, with interest thereon, amounting all together to about \$300, were overdue and unpaid.

On April 7, 1913, the defendant made an entry upon the premises to foreclose the second mortgage for breach of condition for failure to pay the taxes assessed as of April 1, 1912, and thereafter he collected rents from the property amounting to \$141 up to May 29, 1913, when he caused the premises to be sold under the power contained in the second mortgage. Notice of the foreclosure sale was published in conformity with the terms of the mortgage, the sale being advertised to take place on May 15, 1913. On that date no bidders appeared and at the request of Nickerson, the owner of the equity of redemption, the sale was adjourned by the auctioneer until May 29, 1913, at ten o'clock in the forenoon. On May 29, at the time and place fixed for the sale, there were present the defendant and his attorney, the auctioneer, and Nickerson, the owner of the equity of redemption. The defendant bid \$800 for the property and, as there were no other bids, he was declared the purchaser and afterwards executed and delivered a deed under the power in the mortgage in which he was named as grantee. The defendant has since sold the premises subject to the first mortgage and taken a second mortgage for a part of the purchase price.

On June 18, 1913, the defendant brought an action against the plaintiff to recover the balance alleged to be due him on the \$3,700 note, which action is now pending. This bill is brought to enjoin the defendant from prosecuting the action upon the note. The plaintiff alleges that the foreclosure sale was not conducted fairly and in good faith by the defendant on account of which the property was sold for a grossly inadequate price, whereas if the defendant had conducted the sale with due regard for the rights of the plaintiff nothing would be due upon the note.

While the first prayer of the bill is that the foreclosure sale be decreed to be void, we do not understand that the plaintiff at the hearing before the judge of the Superior Court asked for such a decree, but contended that the defendant should be held liable to

account for the fair value of the property and that the plaintiff was entitled to a decree for the difference between such value and the amount for which the property was bid off by the defendant, and that such difference would equal or exceed the balance due on the note. We assume that the contention of the plaintiff before this court is the same as that made by him in the Superior Court.

A final decree having been entered in the Superior Court dismissing the bill, from which the plaintiff has appealed, it becomes necessary to consider in detail the findings of fact made by the judge in his memorandum so far as they are said by the plaintiff to have been plainly wrong.

The fourth assignment of errors raises the question whether there was a valid sale under the power in the mortgage. When the proceedings to foreclose the mortgage were instituted on April 23, 1913, it is plain that there existed a breach of the condition to pay the taxes. The undisputed evidence shows that the taxes assessed as of April 1, 1912, were past due and unpaid and that interest thereon had been accumulating since November 1, 1912, and the security of the mortgage was diminishing. If it be conceded that the defendant was bound to apply the rents received in payment of the taxes, it appears that the total amount of rents collected was much less than the amount of the tax. The contention of the plaintiff that the defendant was obliged to pay the tax before he had a right to foreclose the mortgage cannot be sustained. Under the circumstances disclosed by the evidence the defendant was entitled to proceed to foreclose his mortgage for breach because of the failure of the plaintiff to pay the tax assessed as of April 1, 1912. *Stevens v. Cohen*, 170 Mass. 551, 554. The defendant in executing the power was bound to exercise the utmost good faith for the protection of the rights of the owner of the equity of redemption as well as those of the plaintiff. *Boutelle v. Carpenter*, 182 Mass. 417. The mortgagee in the exercise of the power was bound not only to comply with its literal terms but was required to use reasonable diligence to protect the rights and interests of the owner of the equity of redemption and the plaintiff. *Bon v. Graves*, 216 Mass. 440, 446; *Briggs v. Briggs*, 135 Mass. 306, 309; *Dexter v. Shepard*, 117 Mass. 480. There was evidence to show that the notice of sale was published not only in the Boston Advertiser but also in the Banker and Tradesman, that notice was mailed to the plaintiff, and that the owner of the equity of redemption also had notice, that on May 15, the day fixed for the sale, it was adjourned for two weeks by direction of

the defendant at the request of Nickerson, the owner of the equity, for the purpose of giving him an opportunity to pay the taxes, that, the taxes not having been paid, the sale was made on May 29. While the defendant was the only bidder, that fact is not sufficient to set aside the sale, nor does the fact that the estate brought less than its value as found by the court render it invalid. *Learned v. Geer*, 139 Mass. 31; *Stevenson v. Hano*, 148 Mass. 616; *Fennyery v. Ransom*, 170 Mass. 303; *New England Mutual Life Ins. Co. v. Wing*, 191 Mass. 192; *Turansky v. Weinberg*, 211 Mass. 324; *Vahey v. Bigelow*, 208 Mass. 89. The evidence shows that the defendant complied in all respects with the power. There was also evidence to show that he endeavored to induce others to attend the sale and bid upon the property. On the other hand, while there was evidence to show that the plaintiff had notice of the sale, he did not attend nor does it appear that he did anything to protect his rights by attempting to procure the attendance of others or otherwise. *King v. Bronson*, 122 Mass. 122. So long as the plaintiff relied upon the allegations that the sale was not conducted fairly and in good faith, the burden rested upon him to show it. *Wadsworth v. Glynn*, 131 Mass. 220; *Vahey v. Bigelow*, 208 Mass. 89, 93.

We are of opinion that the notice of sale was valid and that the finding of the judge of the Superior Court that the sale was conducted in good faith and fully conformed to the terms of the power cannot be held to have been plainly wrong. It cannot be ruled as matter of law that notice of the adjournment should have been published in a newspaper or that the proclamation made by the auctioneer on May 15 was not sufficient. As was said in *Dexter v. Shepard*, 117 Mass. 480, at page 485, "A sale regularly adjourned is, when made, in effect the sale of which previous notice had been given." The sale was made only fourteen days after the time named in the original notice and there was evidence that the plaintiff had or might have had notice of the adjournment by the exercise of reasonable diligence for the protection of his interests. The facts in *Clark v. Simmons*, 150 Mass. 357, plainly distinguish that case from the case at bar. Upon this question of adjournment the memorandum of the judge contains the following: "I am unable to find that a further adjournment, even though accompanied by a new advertisement, would have resulted in the attendance at the sale of persons who would have paid a greater sum. Such a favorable result is pure speculation." See *Austin v. Hatch*, 159 Mass. 198.

Decree affirmed with costs.

MASLIN v. MARSHALL

COURT OF APPEALS OF MARYLAND, 1902

(94 Md. 480)

SCHMUCKER, J., delivered the opinion of the Court.

The appeal in this case is from an order of the Circuit Court No. 2 of Baltimore City, overruling certain exceptions to the ratification of a sale of mortgaged property. The sale was made by the appellee, as assignee of the mortgage, in the exercise of a power of sale therein contained.

The mortgage was made on October 28th, 1897, from George A. Dubreuil and others to Mary E. Garrett, William F. Frick and Charles F. Mayer, trustees under the will of the late John W. Garrett, to secure certain promissory notes of the mortgagors.

The mortgage and the notes secured by it were assigned by the trustees to the Safe Deposit and Trust Company of Baltimore, a body corporate, and were by it assigned to the appellee.

The mortgage contained a power of sale in the usual form to "the said William F. Frick, Charles F. Mayer and Mary E. Garrett trustees as aforesaid or the survivors or survivor of them or their successors or successor in said trust," authorizing them to sell the mortgaged property in case of default in payment of the mortgage debt. A default having occurred the appellee made sale of the mortgaged premises, professing to act in so doing under the power of sale contained in the mortgage, and reported the sale to Circuit Court No. 2 for ratification, when the appellant, who was the purchaser at the sale, excepted to its ratification. The Court by its order of October 3d, 1901, overruled the exceptions and finally ratified the sale whereupon the present appeal was taken from that order.

Two grounds of exception were urged in argument by the appellant. One was that the power of sale contained in the mortgage was personal to the mortgagees, who were the trustees already named, and their successors in trust under Mr. Garrett's will, and that it did not pass to, and could not be exercised by, an assignee of the mortgage. The other ground was that even if the power were a transmissible one the assignment of the mortgage to the Safe Deposit and Trust Company which was a corporation destroyed the power because it could not be exercised by a corporation. Neither of these grounds of exception would have con-

stituted a sufficient reason for refusing to ratify the sale and the learned Judge below properly overruled the exceptions and passed the order of final ratification.

The appellant relied especially upon the absence of the word "assigns" after the names of the mortgagees in the power of sale as evidence that the power was not intended to pass with an assignment of the mortgage, but we do not agree with him. The authority to include a power of sale in a mortgage is derived from sec. 6 of Art. 66 of the Code which provides for the insertion in all mortgages of a clause giving such power to "the mortgagee or any other person to be named therein." No mention of, or allusion to, *assigns* or *assignees* is made in that connection, and yet further on in the same sentence it is provided that "where the interests in any mortgage are held *under any one or more assignments*" the power of sale shall be held divisible and the person "*holding any such interest*" who first institutes proceedings to execute the power shall have the exclusive right to sell the mortgaged premises, thus showing conclusively that the Code not only contemplates the exercise of the power of sale by the assignees of a mortgage but in certain cases regulates the method of its exercise by them.

Furthermore this Court has repeatedly held that a power of sale conferred by a mortgage upon the mortgagee, being intended to afford him a means of promptly collecting his debt, is a power coupled with an interest and is therefore appurtenant to the estate and passes with it as part of the mortgage security to an assignee of the mortgage or even of the mortgage debt. *Berry v. Skinner*, 30 Md. 567; *Dill v. Satterfield*, 34 Md. 53; *Mackubin v. Boarman*, 54 Md. 387; *Barrick v. Horner*, 78 Md. 255.

When a power is appurtenant to an estate it passes to the assignee of the estate not because he was designated in the grant of the power, nor because of special confidence reposed in him by such grantor as a suitable person to execute the power. It passes to him as an incident of the estate conveyed to him just as a right of way or other easement or appurtenance used or enjoyed therewith would pass to him. No *delectus personæ* by the grantor is involved in the transmission of such a power, as is the case with a power in gross or a collateral one which can be exercised only by the persons designated in the instrument creating the power.

The absence of the word *assigns* from the clause of the mortgage granting the power of sale in the present case is unimportant for another reason. No words of inheritance are now necessary to pass an estate in fee to the grantee in a deed, nor is the word *as-*

signs or any similar expression requisite to pass to a mortgagee an assignable interest in the mortgaged property, and by parity of reasoning the presence of any such words in a mortgage power of sale should not be required to make it transmissible as an incident of the mortgagee's estate.

In *Dill v. Satterfield*, *supra*, the ratification of a sale of mortgaged property, which has been made by an assignee of the mortgage under a power of sale given to the mortgagee, was excepted to upon the express ground that the power of sale had been conferred upon the mortgagee alone and could not be exercised by the assignee. This Court there held it to be clear, upon the authority of *Berry v. Skinner*, *supra*, that the power had been properly exercised although the appellant was held not to be entitled to raise that question in this Court because he had not appealed from the order overruling his exceptions and ratifying the sale but from a subsequent order awarding a writ of *habere facias* to the purchaser at the sale.

Nor do we think that the power of sale in this case was destroyed because the mortgagee's estate was for a time vested in the Safe Deposit and Trust Company. The charter of that corporation is not in the record and we therefore do not know what special powers it may possess. But assuming that it, like the corporations which were before this Court in the cases of *The Frostburg Mutual Bldg. Assn. v. Lowdermilk*, 50 Md. 179, and *The Queen City Bldg. Assn. v. Price*, 53 Md. 399, was incapable of executing the power, it does not follow that when the mortgage came to be vested in the appellee, who is entirely unaffected by such incapacity, he should be deprived of what was intended to be part of the mortgage security. The inability of the Safe Deposit Company to execute the power of sale did not arise from any defect in the power, but from the infirmity of the company itself. The original donees of the power were natural persons who were unaffected by any disability and it was therefore validly created as an incident of the mortgagee state and, as we have already said, it formed part of the security itself and passed with the estate to the successive assignees thereof. It must upon principle be held to have been exercisable by all such assignees except in so far as they may by reason of their own disability have been incapable of executing it.

The order appealed from will be affirmed.

Order affirmed with costs.

MOWRY *v.* SANBORN

COURT OF APPEALS OF NEW YORK, 1877

(68 N. Y. 153)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department affirming a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term. (Reported below, 7 Hun, 380.)

This was an action of ejectment to recover possession of premises situated in Sandy Hill, Washington county. It has been to this court once before, when it was heard and decided by the Commission of Appeals. (See mem. of decision, 65 N. Y. 581.)

Plaintiffs claimed title under a statutory foreclosure by advertisement of a mortgage executed by defendant and wife to plaintiff Mowry as president of the Washington County Bank and by it transferred to the Washington County National Bank, by whom the mortgage was foreclosed. The said bank became the purchaser, and subsequently conveyed to plaintiffs. The mortgage was for the sum of \$3,000, and contained the following condition and covenant: "But this conveyance is made on this express condition, that if the said Jesse K. Sanborn, his heirs, executors, administrators or assigns shall and do pay to the said party of the second part, his successor, successors or assigns, the notes, drafts or other commercial paper of the said Jesse K. Sanborn, or on which his name appears as maker, drawer or indorser, now held and owned by said Washington County Bank, and shall also pay any notes, drafts or other commercial paper of said Sanborn, or on which his name shall appear as maker, drawer or indorser, which shall be hereafter discounted, received, held or owned by said Washington County Bank; but this mortgage is not to be security for over three thousand dollars at any one time, and is not to extend to any paper received or discounted after three years from the date of this mortgage." "And the said Jesse K. Sanborn, for himself, his heirs, executors, administrators and assigns, covenants with the said party of the second part, his successor, successors and assigns to pay the said notes, drafts and other commercial paper, and the interest thereon at the times limited for the payment thereof as aforesaid; and that in case of non-payment of the interest, or any part thereof, at the time or times limited for the payment thereof, or within three days thereafter, then all

the moneys hereby secured which remain unpaid, shall, at the election of the party of the second part, his successor, successors and assigns, become forthwith due and payable; and in case of the non-payment of said notes, drafts and other commercial paper, as above provided, or any part thereof, at the times limited for the payment thereof, it shall and may be lawful for the said party of the second part, his successor, successors and assigns, and the said party of the first part does hereby empower and authorize the said party of the second part, his successor, successors and assigns to sell the said premises, with the appurtenances or any part or parts thereof, in the manner prescribed by law, and out of the moneys arising from such sale or sales to retain all the principal money and interest remaining unpaid on said notes, drafts and other commercial paper, and the costs, charges and expense of making such sale."

Upon the trial the plaintiffs produced in evidence the affidavits, etc., in the foreclosure proceedings. The affidavit of service of notice of foreclosure was made by the attorney, who stated, in substance, that service was made upon defendant by mailing notice at Greenwich, addressed to him as follows: "Jesse K. Sanborn, Sandy Hill, Washington county, N. Y." The affidavit, after stating service of notice by mail upon other persons, contained this clause: "At that time each of said persons resided, as this deponent is informed and believes, at the respective places to which their said notices were so addressed."

Plaintiff proved by parol evidence that defendant did reside at Sandy Hill at the time of service of notice, and the court so found.

Defendant's counsel moved for a nonsuit and for judgment on the grounds, among others: 4. That there is no sufficient proof of service on the mortgagor. 6. That the foreclosure not being in conformity to the statute, was void, which motion was denied. The court held that plaintiff did not have title.

ANDREWS, J.¹ The principal question in the case is the one already suggested, viz., was evidence admissible to prove that the mortgagor resided at Sandy Hill when the notice was mailed? or, the question involved is still more comprehensive, viz., when title is claimed under the foreclosure of a mortgage, by advertisement, may the fact of the service of notice of sale, upon the mortgagor or other persons affected by the proceedings, be shown in support of the title, by any competent common-law evidence, in

¹ Portions of opinion omitted.

the absence of an affidavit showing such service? The right of a mortgagee to extinguish the equity of redemption by a sale of the land without judicial proceedings or the decree of the court, depends upon the existence of a power of sale in the mortgage or other instrument executed by the mortgagor. If a power of sale is not given, the mortgagee must resort to a court of equity to enforce the mortgage. This principle of the common law has been retained in the statute for the foreclosure of mortgages, by advertisement, which only authorizes this proceeding in cases where the mortgage contains a power of sale. (2 R. S., 545, § 1.)

In the absence of a statute regulating the mode of executing the power the mortgagee may sell the land at public or private sale, unless the particular manner of sale is prescribed by the instrument creating the power (*Davey v. Durant*, 1 De Gex and J., 535; 2 Wash. on Real Prop., 77), in which case the mortgagee must, in executing the power, conform to the conditions imposed. The mortgagee could not at common law become the purchaser on a sale made by himself under the power, or at least such a sale was voidable at the election of the mortgagor. He could not at the same time be a trustee of the power of sale, and a purchaser under it. (1 Sug. on Vend. 94; 3 *id.* 229; Wash. on Real Prop. 77.) And, where a sale was made under the power a deed from the mortgagee to the purchaser was necessary to pass the title. (*Arnot v. McClure*, 4 Den. 44.)

The mortgagee under the law of England has the legal title to the mortgaged premises, and under our law it remains in the mortgagor until foreclosure, but in either case a deed is necessary to satisfy the statute of frauds, and to vest the title in the purchaser, unless the legislature has interfered and created an exception, or has substituted some other evidence of title in place of a common-law conveyance.

When a power of sale is given to be executed under certain conditions, or its execution is made by the terms of the power to depend upon the performance of precedent acts, and the validity of a conveyance made in assumed execution of the power is in question, oral evidence of a compliance with the conditions, is admissible, unless such proof is excluded by the nature of the conditions imposed, or the terms of the power. In *Hawley v. Bennett*, (5 Paige, 104), entries in the register of an attorney, who conducted a foreclosure by advertisement, were admitted after his death in support of the title under a deed given on the foreclosure, to show a compliance with the statute, and the circumstances of the sale.

The foreclosure was before the statute of 1808, which made affidavits of the parties, etc., *prima facie* evidence, and in *Arnot v. McClure*, BRONSON, Ch. J., says: "Before we had any such statute the regularity of the proceedings could only be established by common-law evidence; and any kind of common-law evidence was admissible." When the title to real estate is claimed under a conveyance purporting to be made in execution of a power, which by its terms is to be exercised in a certain event or after notice to the grantor or third person, or the doing of any other act by the grantee of the power, oral evidence of the happening of the event or of the performance of the condition precedent, does not add to, vary, or contradict the deed, but is consistent with it, and is admissible to show that the grantee of the power acted within his authority.

The statute for the foreclosure of mortgages by advertisement was passed to regulate the mode of executing the power of sale, when given in the mortgage. The statute as originally enacted, provided for notice of the sale to be given by publication and posting (1 R. L. 376), and in 1844, the statute was amended by requiring in addition, that the notice should be served personally or by mail on the mortgagor (chap. 346, Laws of 1844, § 5), and in 1857 the statute was further amended providing that a copy of the notice should be delivered to the county clerk, to be affixed in a book in his office, and that an entry of the time of receiving and affixing it should be made. (Chap. 308, Laws of 1857.) All these several acts required to be done, were parts of the notice to be given, and were to be performed prior to the sale, at the times specified in the statute. These statute requirements were conditions precedent to a valid sale under the power and have the same effect as if they were inserted in the mortgage, and a person claiming title under a statute foreclosure, assumes the burden of showing that they were performed. But unless the statute has otherwise provided, it seems not to admit of doubt that the publication, posting and service of notice on the mortgagor and other persons can be proved by oral testimony, in fact this would usually be the only available proof. The legislature, by an act passed in April, 1808, first made the affidavits of the printer, etc., when recorded *prima facie* evidence of the publication and posting of the notice of sale, and of the circumstances of the sale. This was an innovation upon the common-law rules of evidence, and the object of the statute was to enable the purchaser to perpetuate the evidence of the facts upon which the validity of the sale depended.

The same statute authorized the mortgagee to purchase, and both of the provisions referred to were embodied in the act concerning mortgages. (Chapter 22 of the Laws of 1813; 1 R. S. 374, §§ 7-10.) The sixth section of that act contemplates that a deed should be given to the purchaser on the sale, and until the act of 1838, which will be hereafter referred to, this was necessary to pass the title, except where the mortgagee was the purchaser. In that case no deed could be given, as the mortgagee could not convey to himself, but as the statute expressly recognized his right to purchase, and made no provision for a conveyance, the court held in *Jackson v. Colden*, (4 Cow. 266), that on a purchase by the mortgagee, the title passed by force of the statute, without a deed. Some effect appears to have been given to the fact that affidavits had been made and recorded, showing a sale to the mortgagee.

In the revision of 1830, an entirely new provision was inserted in the statute, being section 12, now section 14, for the purpose, as the revisers say, of removing doubts which had been excited respecting the evidence of title acquired on a purchase by a mortgagee, and to "declare the law as now understood." (5th Ed. St. 764.) That section as originally passed provided that when the mortgaged premises were purchased on the sale by the mortgagee, his legal representatives or assigns, the "affidavits of the publication and affixing notice of sale, and of the circumstances of the sale, shall be evidence of the sale and of the foreclosure of the equity of redemption as herein specified, without any conveyance being executed, in the same manner, and with the like effect as a conveyance executed by a mortgagee upon such sale to a third person." This section came under the consideration of the court in *Arnot v. McClure*. In that case the assignee of a mortgage, foreclosed it under the statute and became the purchaser, and affidavits of publication and posting of the notice, and of the circumstances of the sale were made and recorded. In the affidavit of the circumstances of the sale, the boundaries of the property sold as therein given, did not embrace a portion of the mortgaged premises, and oral proof was offered to show, that in fact, the whole premises were sold, and that the portion not embraced in the description in the affidavit was by mistake omitted. The proof was rejected on the trial, and on appeal the ruling was affirmed. The court held, in an opinion by BRONSON, Ch. J., that affidavits were necessary to complete the title when the mortgagee or his assignee was the purchaser on the foreclosure; that in that case, as no deed could be given, the affidavits were, by the true con-

struction of section 14, to have the force and effect of a conveyance by the mortgagee to a third person, "and to perform the double office of proving the regularity of the proceedings to foreclose, and standing as a conveyance to the purchaser;" and from these provisions the conclusion was reached that the mortgagee, or his assignee, could not be permitted, by oral proof, to contradict, impeach, or supply an omission or defect in the affidavits "any more than he could a conveyance by deed." Section 14 was an important addition to the previous law. As construed in *Arnot v. McClure* it resolved the doubt which existed under the statute as it previously stood, and affirmed the general policy of the law which does not permit a title to real estate to pass without a conveyance in writing, by declaring that the affidavits mentioned should, when the mortgagee became the purchaser, stand for a conveyance of the land. This section was amended, in 1838, by allowing a substitution of the affidavits, specified therein, in all cases, in place of a deed; but when the purchaser was a third person a deed might still be given and the title supported by oral proof of a compliance with the provisions of the statute. (*Arnot v. McClure*.)

In the case now before us the assignee of the Sanborn mortgage became the purchaser on the foreclosure; affidavits of the publication and posting of the notice of sale and of the circumstances of the sale were made and recorded and were produced on the trial, together with the affidavit of notice of service on the mortgagor, which the Commission of Appeals decided to be defective in the respect before mentioned. It is very clear, I think, that oral proof was admissible to establish the omitted fact, viz., that the mortgagor, when the notice was served, resided at Sandy Hill, unless the affidavit of service was a part of the statute conveyance provided for in section 14. It cannot be so held unless we can incorporate into that section, with the other affidavits mentioned, the affidavit of service which was first provided for in 1844; and if this can be done, the affidavit of affixing the notice in the books of the county clerk, provided for by the act of 1857, must also be deemed included. Neither of these affidavits are specified in the section. If, when section 14 was passed, notice had been required to be served on the mortgagor and to be put in the books of the clerk, it is very probable that the affidavits of these facts would have been made a part of the statute conveyance. It would certainly contribute to the symmetry and completeness of the system, and to the security of foreclosure titles, that all the prerequisites

to a valid foreclosure should be shown by affidavits, and made a part of the statutory title. But we can see no justification for construing section 14 as it stands, as if the affidavits of service and of affixing notice in the books of the clerk, were mentioned in it. The argument that such a construction would be a protection against frauds and prejudices, will not justify it. In *Tuthill v. Tracy*, (31 N. Y. 157), it was held that a sale made pursuant to the statute bars the equity of redemption, without affidavits being made, and if now a deed is given on the sale, without affidavits, the facts (according to the opinion in *Arnot v. McClure*) of publication, posting, etc., may be established by oral evidence. In each of these cases the danger of fraud and perjury, is the same as is suggested here.

The production of the affidavits mentioned in section 14, without proof of service on the mortgagor, or of affixing notice in the clerk's office, are not, since the amendments of 1844 and 1857, evidence of a complete foreclosure. By the eighth section, it is a sale conducted as "herein prescribed," which bars the equity of redemption, and the party claiming title under the foreclosure would be bound to show all the facts necessary to a valid sale before he could recover under it, and we think the true construction of the fourteenth section in this respect is, that the affidavits therein mentioned, when no deed has been executed, are evidence in the same manner, and to the same extent of a foreclosure as they would be if a deed had been executed.

We are of opinion, for the reasons stated, that the oral evidence of the residence of the mortgagor at the time the notice was served was competent and should have been considered by the learned judge on the trial.

We think the judgment should be reversed on the point first considered, and a new trial granted.

All concur.

CHURCH, CH. J., ALLEN and RAPALLO, JJ., were also of opinion that the affidavit of service was sufficient.

*Judgment reversed.*¹

NEW YORK CODE CIV. PROC., § 2387. *When mortgage may be foreclosed.* A mortgage upon real property, situated within the State, containing therein a power to the mortgagee, or any other

¹ See also, *Van Vleet v. Enos*, 88 Hun (N. Y.), 348, 34 N. Y. Supp. 754 (1895).

person, to sell the mortgaged property, upon default being made in a condition of the mortgage, may be foreclosed, in the manner prescribed in this title, where the following requisites concur:

1. Default has been made in a condition of the mortgage, whereby the power to sell has become operative.

2. An action has not been brought to recover the debt secured by the mortgage, or any part thereof; or, if such an action has been brought, it has been discontinued, or final judgment has been rendered therein against the plaintiff, or an execution, issued upon a judgment rendered therein in favor of the plaintiff has been returned wholly or partly unsatisfied.

3. The mortgage has been recorded in the proper book for recording mortgages, in the county wherein the property is situated.

§ 2388. *Notice of sale; how given.* The person entitled to execute the power of sale, must give notice, in the following manner, that the mortgage will be foreclosed, by a sale of the mortgaged property, or a part thereof, at a time and place specified in the notice:

1. A copy of the notice must be published, at least once in each of the twelve weeks, immediately preceding the day of sale, in a newspaper published in the county or in a municipal corporation a part of which is within the county in which the property to be sold, or a part thereof, is situated.

2. A copy of the notice must be fastened up, at least eighty-four days before the day of sale, in a conspicuous place, at or near the entrance of the building, where the county court of each county, wherein the property to be sold is situated, is directed to be held; or, if there are two or more such buildings in the same county, then in a like place, at or near the entrance of the building nearest to the property; or, in the city and county of New York, in a like place, at or near the entrance of the building where the trial and special terms of the supreme court of the first judicial district are directed by law to be held.

3. A copy of the notice must be delivered, at least eighty-four days before the day of sale, to the clerk of each county, wherein the mortgaged property, or any part thereof, is situated.

4. A copy of the notice must be served, as prescribed in the next section, upon the mortgagor, or, if he is dead, upon his executor or administrator, if an executor or administrator has been appointed, and also upon his heirs, providing he died the owner of the mortgaged premises. A copy of the notice may also be served, in a

like manner, upon a subsequent grantee or mortgagee of the property, whose conveyance was recorded, in the proper office for recording it in the county, at the time of the first publication of the notice of sale; upon the wife or widow of the mortgagor, and the wife or widow of each subsequent grantee whose conveyance was so recorded, then having an inchoate or vested right of dower, or an estate in dower, subordinate to the lien of the mortgagee; or in the event of the death of the subsequent grantee who was at the time of his death the owner of the mortgaged premises, then upon his heirs; or upon any person, then having a lien upon the property, subsequent to the mortgage by virtue of a judgment or decree duly docketed in the county clerk's office and constituting a specific or general lien upon the property. The notice, specified in this section, must be subscribed by the person entitled to execute the power of sale, unless his name distinctly appears in the body of the notice, in which case it may be subscribed by his attorney or agent.

§ 2391. *Contents of notice of sale.* The notice of sale must specify:

1. The names of the mortgagor, of the mortgagee and of each assignee of the mortgage.
2. The date of the mortgage, and the time when, and the place where, it is recorded.
3. The sum claimed to be due upon the mortgage, at the time of the first publication of the notice; and, if any sum secured by the mortgage is not then due, the amount to become due thereupon.
4. A description of the mortgaged property, conforming substantially to that contained in the mortgage.

§ 2392. *Sale; how postponed.* The sale may be postponed, from time to time. In that case, a notice of the postponement must be published, as soon as practicable thereafter, in the newspaper in which the original notice was published; and the publication of the original notice, and of each notice of postponement, must be continued, at least once in each week, until the time to which the sale is finally postponed.

§ 2393. *Id.; how conducted.* The sale must be at public auction, in the daytime, on a day other than Sunday or a public holiday, in the county in which the mortgaged property, or a part thereof, is situated; except that, where the mortgage is to the people of the State, the sale may be made at the Capitol. If the property consists of two or more distinct farms, tracts, or lots, they must be sold separately; and as many only of the distinct farms, tracts, or

lots, shall be sold, as it is necessary to sell, in order to satisfy the amount due at the time of the sale, and the costs and expenses allowed by law. But where two or more buildings are situated upon the same city lot, and access to one is obtained through the other, they must be sold together.

§ 2394. *Mortgagee, etc., may purchase.* The mortgagee, or his assignee, or the legal representative of either, may, fairly and in good faith, purchase the mortgaged property, or any part thereof, at the sale.

§ 2395. *Effect of sale.* A sale, made and conducted as prescribed in this title, to a purchaser in good faith, is equivalent to a sale, pursuant to judgment in an action to foreclose the mortgage, so far only as to be an entire bar of all claim or equity or redemption, upon, or with respect to, the property sold, of each of the following persons:

1. The mortgagor, his heir, devisee, executor or administrator.
2. Each person claiming under any of them, by virtue of a title or of a lien by judgment or decree, subsequent to the mortgage, upon whom the notice of sale was served, as prescribed in this title.
3. Each person so claiming, whose assignment, mortgage, or other conveyance was not duly recorded in the proper book for recording the same in the county, or whose judgment or decree was not duly docketed in the county clerk's office, at the time of the delivery of a copy of the notice of said sale to the clerk of the county; and the executor, administrator, or assignee of such a person.
4. Every other person, claiming under a statutory lien or incumbrance, created subsequent to the mortgage, attaching to the title or interest of any person, designated in either of the foregoing subdivisions of this section.
5. The wife or widow of the mortgagor, or of a subsequent grantee, upon whom notice of the sale was served as prescribed in this title, where the lien of the mortgage was superior to her contingent or vested right of dower, or her estate in dower.

(d) *Foreclosure by Equitable Action*

STEVENS v. THEATRES, LIMITED

SUPREME COURT OF JUDICATURE—CHANCERY DIVISION, 1903

(L. R. [1903] 1 Ch. 857)

ON February 20, 1896, the defendant company, Theatres, Limited, executed a mortgage of a theatre and other properties to the plaintiff Stevens. The mortgage contained a power of sale. On September 14, 1897, the plaintiff commenced an action by summons for the foreclosure of his mortgage, and on November 26, 1897, an order was made for foreclosure nisi. This order was in the common form directing accounts, and directing the plaintiff to reconvey the property on payment of what should be found due. The accounts were not proceeded with, and no master's certificate had been made. On December 3, 1897, the mortgagee gave notice to the mortgagor that he intended to sell, and on December 17, 1897, he entered into a contract to sell to Drucker. On February 3, 1898, he conveyed to Drucker in exercise of the power of sale in his mortgage, and in August, 1899, Drucker sold and conveyed to Miss Kate Santley. Miss Kate Santley was afterwards, on her own application, made a party to the foreclosure action, and the action was brought on for the decision of the following agreed point of law: "Whether, assuming that apart from the order of 26th November, 1897, the plaintiff Stevens had, by virtue of the mortgage of the 20th February, 1896, a power of sale exercisable on the 17th December, 1897, he was prevented from exercising such power by reason of the existence of the order of the 26th November, 1897."

FARWELL, J. This application raises a neat abstract point of law, on which I am told there is no authority: this may be because powers of sale were not usually inserted in mortgages until seventy or eighty years ago: see *Clarke v. Royal Panopticon*, [1857] 4 Drew. 26. [His Lordship then stated the facts of the case and the agreed question as above, and proceeded:—]

I propose to qualify my answer to that question in order to preserve any rights that Miss Santley may have as a purchaser for value without notice, if she can hereafter prove that she is in that position.

Now this question—whether a decree for foreclosure directing

accounts and reconveyance, or, by parity of reasoning, a decree for redemption directing accounts and reconveyance, on payment, operates to prevent the exercise of the power of sale in the mortgage, or that given by the statute—has to be decided on principle in the absence of authority. The first proposition, which I think is plain, is this—neither the mortgagee nor the mortgagor is entitled to dismiss his action, or to discontinue after judgment. The general principle on which the Court acts with regard to actions of this sort is to regard the plaintiff as *dominus litis* until judgment; but if, and so far as the judgment operates for the benefit, not merely of himself, but of some one else, he cannot get rid of his action *mero motu* after judgment. If authority is necessary, I refer to *Taylor v. Mostyn*, 25 Ch. D. 48, and the *Exchange and Hop Warehouses, Limited v. Association of Land Financiers*, 34 Ch. D. 195.

Now, if the plaintiff cannot get rid of his action after judgment because the judgment is for the benefit also of the defendants, it must follow that he cannot in any way vary the form of that judgment by doing an act which would put it out of his power to perform that which the Court has directed him to do as the condition of getting the judgment.

The mortgagee has got his title absolute at law, but the mortgagor has his right of redeeming, and the mortgagee has the right to come to this Court and say, "Put an end to that power." The Court regards with impartiality both mortgagor and mortgagee. It does not deprive the mortgagee of his legal rights without giving him corresponding benefits, nor does it deprive the mortgagor of his right to redeem without giving him an opportunity of paying, what is due when the sum is finally ascertained. When the parties have once taken the judgment of the Court neither party, in my opinion, is entitled without the leave of the Court to put it out of his own power, by any act of his own, to obey the judgment of the Court. It is said to be a hardship on the mortgagee that the mortgagor by commencing proceedings for redemption and getting his judgment can prevent the exercise of the power of sale. So far as commencing proceedings is concerned it is clear that that does not prevent the exercise of the power of sale. That is decided by *Adams v. Scott*, 7 W. R. 213. So far as regards any hardship from the judgment of the Court, the Court may be trusted, I hope, not to make any decree which will operate harshly or unfairly on either party. In the case suggested in argument, if the mortgagee is on the point of entering into a contract to sell a property which is

a } difficult to dispose of, or an insufficient security, I apprehend the Court would take that into consideration before it made a decree for redemption, and it might possibly, instead of ordering redemption or in addition thereto, give some direction for carrying out that particular sale. I am not pressed with that difficulty, because it appears to me to be a difficulty which assumes a certain want of perception and power on the part of the Court of which I should be unwilling to admit it was guilty. Nor is there any hardship in delay in prosecuting accounts and inquiries, for either side can come to the Court and say, "It is no use keeping this hanging over us; let us stay all further proceedings," as was done in the *Exchange and Hop Warehouses Case*, 34 Ch. D. 195.

{ I hold, therefore, that the power of sale cannot be exercised after the judgment *nisi* without the leave of the Court, because it prejudices the rights given to the mortgagor by the Court under the direction to reconvey. The question next arises, What is the effect of the order of the Court? Does this extinguish the power or does it not? That would affect materially the case of Miss Santley, if she can prove herself to be a purchaser for value without notice having the legal estate. In my opinion the power of sale is not extinguished. It is important to remember that the mortgagor can institute proceedings for and obtain redemption almost as a matter of course. If the decree *nisi* for redemption absolutely extinguished the power of sale, it would surely have been urged in argument or taken into consideration in some case as a reason against granting such a decree; but no trace of any such case can be found. If the power is once extinguished it must be gone for ever; but I think this would be inconsistent with the view taken by the Lords Justices in *Watson v. Marston*, 4 D. M. & G. 230. That was a case of specific performance, and the Court declined to force the vendor to convey as the purchaser desired in exercise of his power of sale after a decree for foreclosure absolute. The condition of sale, to some extent, held out that course as available, because the vendor was described as a mortgagee with power of sale. But the ground on which it was put was hardship on the vendor, who by exercising the power of sale would open the foreclosure. It is true that in the course of the argument Knight Bruce, L. J., makes an obiter observation that the purchaser might be preferring a bad to a good title; but it is merely a suggestion, and I do not find that the Lords Justices ever said there was no title at all to sell under the power of sale; if it could have been said that there is no such power existing, it would have been a short answer to make to

a man who was insisting on having a conveyance under that power. The foreclosure *nisi*, in my opinion, does not destroy the power; the remedies of the mortgagee are merely suspended for the purpose of carrying out that particular relief which he has sought, and would remain available for him, if, for example both parties were to agree that all the proceedings should be stayed, or the Court should order, as it did in the *Exchange and Hop War houses Case*, 34 Ch. D. 195, the taking of the account to be stayed. In that case the direction to reconvey still remained. It appears to me it would be impossible to hold that the power of sale was gone by reason of that direction to reconvey, although the Court had said it was idle to go on with the accounts because the balance was so enormously against the mortgagor that it was useless. a

This is a question of some importance to purchasers, because, assuming there is no lis pendens registered, a purchaser buying in good faith from a mortgagee under a power of sale would find he had no title at all if the power was absolutely extinguished. I do not know of any case in which a power has ever been held to be extinguished by reason of any of the usual decrees of the Court, such as the decree for administration. Even a decree for dissolution of marriage by the Court does not of itself extinguish the settlement which was made upon the marriage, or any powers contained therein. A decree for the administration of the trusts of a will or for the execution of the trusts of a settlement does not extinguish the power: it merely requires the person exercising it to come for the leave of the Court before he does it. In my opinion, if the mortgagee had in this case come to the Court he might have got leave to exercise the power. I see nothing in the fact that s. 25, sub-s. 2, of the Conveyancing Act gives the Court a power of sale inconsistent with leaving in existence the power given by the deed or by s. 19 of the Act. The power of sale in s. 19 is given only to mortgagees who have a mortgage by deed, whereas the power of sale by the Court and the power to ask the Court to direct a sale under s. 25 extends to equitable mortgages as well. There is nothing in the least inconsistent to my mind between the two sections.

The result is, in my judgment, that the mortgagee could not exercise the power of sale without the leave of the Court, but that the power of sale was not extinguished, so that the question whether a purchaser from a mortgagee got a good title or not will depend on whether she is affected with notice or whether she got the legal estate without notice.

The declaration finally settled was:—

a "That the mortgagee could not exercise his power of sale without the leave of the Court so as to give a good title to any one other than a purchaser for value without notice. But this is not to preclude the mortgagee from setting up any other equity he may have in any action brought by the mortgagor."

MOULTON v. CORNISH

COURT OF APPEALS OF NEW YORK, 1893

(138 N. Y. 133)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made November 17, 1891, which modified and affirmed, as modified, a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This was an action for the foreclosure of a mortgage.

MAYNARD, J.¹ In 1886 the plaintiff was the owner of a mortgage, given to secure the payment of eighty-six hundred and fifty dollars and interest, upon three several lots of land in the town of Floyd, Oneida county, known as the Klock, Eells and Tavern farms, and the defendant was the owner of a subsequent mortgage upon the same property given to secure the payment of \$2,500 and interest, which, with the assignments to him, were recorded in the Oneida county clerk's office.

On May 16th, the plaintiff commenced an action in the Supreme Court for the foreclosure of her mortgage, but omitted to make the defendant a party thereto. This omission was not intentional, but the plaintiff was misled by an abstract of a search obtained from the clerk's office, from which it might have been fairly inferred that the defendant's assignment was one in a series of transfers, and that the title to his mortgage was in another, who was made a defendant, and who appeared from the abstract to be a subsequent assignee. If a full statement of the search in the usual form had been obtained by the plaintiff, the interest of the defendant in the mortgaged property would have correctly appeared. The action resulted in a judgment entered December 27, 1888, decreeing a foreclosure of

¹ Portions of opinion omitted.

the plaintiff's mortgage, and a sale of the mortgaged premises by a referee pursuant to the provisions of the Code, and the practice of the court in such cases. The premises were first advertised by the referee to be sold on March 2, 1889. Before that time the plaintiff discovered that the defendant was a necessary party to the complete foreclosure of her mortgage, and she procured the sale to be postponed until March 16th; and made a motion, at a Special Term held at Syracuse on that day, for an order granting her leave to amend the summons, complaint, *lis pendens* and judgment in the action by inserting therein the name of this defendant, and adjudging and decreeing that he be forever barred and foreclosed of all right, title, interest and equity of redemption in the mortgaged premises, or for such further order or relief as the court might deem proper to grant. Upon the hearing of that motion, the court made an order, which was entered, and which has not been reversed or vacated, directing that upon payment of \$10 costs, the plaintiff might, if she so elected, open the judgment in the foreclosure suit, and amend the summons, complaint, *lis pendens* and all subsequent proceedings, by making this defendant a defendant in that action, and inserting the necessary allegations for that purpose, and that the amended summons and complaint be served on him, and that he have the usual time to answer. The plaintiff did not avail herself of the privilege afforded by this order, and on March 16, 1889, the referee proceeded to sell the mortgaged premises. At the opening of the sale, and before selling, the referee announced and read the conditions of sale, which were in the usual form, except the last paragraph, which was in these words: "7. The property is sold free and clear of any and all rights of dower, charge or lien upon the same, except that it is claimed by one Nehemiah N. Cornish (the defendant in this action) that he is the owner by assignment, of a mortgage made by Ichabod C. McIntosh to Miriam M. Kellogg, covering the premises in question, dated February 1st, 1878, to secure the payment of \$2,500, which mortgage was recorded in Oneida county clerk's office February 13th, 1878, and is a second lien upon said mortgaged premises. Cornish has not been made a party defendant to this action." The plaintiff bid off the property known as the Tavern farm, and the referee on the same day executed to her a deed, and very soon thereafter she went into possession. The sale was confirmed on the 6th of April, and on April 9th, this action for a strict foreclosure was brought. The other farms were bid off by other parties, who have not been made defendants in this action. The plaintiff has

recovered a judgment which, as modified by the General Term, decrees, 1st, that the defendant's mortgage is an existing lien on the lands purchased by plaintiff upon the foreclosure of her mortgage, and was not affected by such foreclosure because not made a party to the action; 2d, that if the defendant desires to redeem the land bid off by the plaintiff upon her mortgage, he shall within ten days from the service of a copy of the judgment, give the plaintiff notice of his desire and intent to do so. If such notice is not given within the time specified, it is ordered and adjudged, that the defendant and all persons claiming under him, do stand and be forever barred and foreclosed of and from all right, title, interest and equity of redemption of, in and to such premises, and all liens which he may have had thereon at the time of the commencement of the foreclosure action, by virtue of his mortgage or otherwise, are to be adjudged as cut off and foreclosed, and the plaintiff shall hold the title thereto, free from such liens, and the defendant shall pay the costs of the action; 3d, if the defendant gives notice of his intention to redeem, within the time required, the plaintiff may apply on notice to the Special Term, for the appointment of a referee, to take and state the account of the plaintiff, and to determine her interest in the mortgage debt, as applicable to the lands bid off by her, and the referee's report shall be made up according to certain directions contained in the judgment, and shall fix and determine the amount the defendant shall be required to pay upon such redemption, and the amount so found due by the referee, with the interest thereon, shall be paid by the defendant within six months from the service of a copy of the report, and if paid within such time, the payment shall operate as a redemption of the premises from the plaintiff's mortgage, and her title acquired at the sale shall become vested in him, and she shall, by a proper conveyance, convey the premises to him free and clear from the lien of her mortgage, and neither party shall have costs of the action; but if the defendant fails to complete the redemption in the manner, and within the time specified, it is ordered and adjudged, that the lien of his mortgage is cut off and removed, and the plaintiff is deemed to hold the premises free and clear of such lien, and the defendant shall pay the costs of the action.

(The material facts are not disputed, and we are of the opinion, that upon the proofs submitted and the findings of the trial court, the plaintiff was not entitled to the relief granted to her in this judgment.

/ The equitable remedy known as a strict foreclosure of a real

property mortgage, has never been recognized in this state, save in a very limited class of cases.

In England it was the prevailing method of procedure, until the enactment of the statutes of 15 and 16 Victoria, ch. 86 (§ 48), known as the Chancery Improvement Act. It had its root in the common-law doctrine that, upon the execution of the mortgage, the mortgagee acquired the fee of the land, and upon default in payment, a right to the possession, and the mortgagor had no estate or interest therein, and no right of possession, after default had been made in the payment of the mortgage debt. The mortgagee's remedy was by ejectment, and in a court of law it was not an available defense for the mortgagor to plead that he was willing and ready to pay the debt, if he had once suffered a default to occur. In order to mitigate the hardships of this relation, equity permitted the mortgagor and his privies to redeem by discharging the mortgage debt, and by restoring to him the possession of the land if the mortgagee had taken possession. As it might be uncertain whether the mortgagor or subsequent lienors would ever avail themselves of the right of redemption, it was, while outstanding, a serious impediment to the alienation of the mortgaged property, and equity would, therefore, entertain an action to compel the parties entitled to this right, to exercise it by paying within a reasonable time, the amount of the mortgage debt, or be forever barred or foreclosed of the right of redemption; and in case of redemption, the decree provided that the mortgagee should reconvey the lands to the mortgagor, or other party redeeming.

This proceeding has been termed a strict foreclosure, but it is apparent that it has no appropriate place in a system of laws and jurisprudence where it has been declared that the mortgage does not operate as a conveyance of the legal title, but is only a chose in action constituting a lien upon the land as security for the debt or other obligation of the mortgagor. The courts of this state have refused to adopt it as an authorized remedy in ordinary cases, and in this respect have followed the practice of the civil, rather than of the common law. In the *Am. & Eng. Encyclopædia of Law* (vol. 8, 186-7, tit. Foreclosure) it is stated that strict foreclosure is very rarely resorted to in the American courts; that in a large majority of the states it is not recognized; that in two it is the usual mode of procedure; and that in six of the states, including New York, it is permitted in exceptional cases.

The plaintiff here rests her right to this remedy principally upon the fact that she was the owner of a prior mortgage, which

she had foreclosed, and that she became the purchaser of a part of the mortgaged property at the foreclosure sale, and that the defendant's subsequent mortgage was not cut off or affected by the foreclosure, because she did not make him a party to the foreclosure action. Before the sale occurred she had full knowledge that the defendant was the owner of the second mortgage, and leave was given her by the court to make him a party to the action, and so conclude him by the judgment, which she declined to accept, but caused the sale to proceed, and purchased the property upon such terms that both expressly and in legal effect, her purchase was subject to the lien of the defendant's mortgage.

Under such circumstances no case was made for a resort to this unusual, exceptional and severe remedy. It is insisted that, under the provisions of the Civil Code relating to foreclosure actions, such a judgment as the one entered herein cannot be rendered in any case; but it is unnecessary to determine that question upon this appeal. We may assume that, in a proper case, jurisdiction still exists to relieve a purchaser at a foreclosure sale, who finds that, by reason of some defect in the proceedings, the lien of a subsequent incumbrance has not been extinguished; but the facts here shown are not sufficient to authorize the exercise of that jurisdiction. We think that in such cases the purchaser must show that he purchased in good faith, relying upon the regularity and sufficiency of the foreclosure proceedings, and that the subsequent lienor had knowledge of the sale, and permitted the purchaser to make the purchase, without disclosing the existence of his incumbrance, or calling attention to the defect in the proceedings. In 2 Jones on Mort., (§ 1540, p. 421), it is stated that a strict foreclosure is proper "where a mortgagee or purchaser is in possession under a legal title from the mortgagor, for the purpose of cutting off subsequent liens or incumbrances, as in case one has purchased in good faith at a mortgage sale, which is not conclusive against some incumbrancer not made a party to the suit, and the purchaser has gone into possession." The cases have been very rare in this state where the remedy has been invoked, but we fail to find a case where it has been applied to relieve a party who buys with full knowledge of the outstanding incumbrance and subject to it.

The right to a judicial sale of the mortgaged property to pay the mortgage debt, is in this state one of the incidents of the mortgage contract; and if the mortgagor is in default, the mortgagee is entitled to the enjoyment of this right unimpaired. It can

only be secured to him by a sale, in an action or proceeding to which he is a party; for in all such cases the sale is made for the benefit of all the parties interested, and the proceeds are distributed among them, in the order of the priority of their respective liens.

As to this defendant, the plaintiff is only a mortgagee in possession. It is true she has also acquired the title of the mortgagor and has extinguished the liens of all other incumbrancers, who were made parties to the foreclosure action.

But she occupies no better position with respect to the defendant than if she had taken a deed from the mortgagor and an assignment of the other incumbrances and had gone into possession. As to the defendant, her mortgage is still unforeclosed, and the estate, which the mortgagor had when he executed the defendant's mortgage, is still subject to its lien. The plaintiff may at any time foreclose her mortgage, as against the defendant, notwithstanding the former defective foreclosure. (*Brainard v. Cooper*, 10 N. Y. 356; *Walsh v. Rutgers Fire Ins. Co.*, 13 Abb. Pr. 33; *Franklyn v. Howard*, 61 How. Pr. 43.) It imposes no hardship to require her to pursue such course if she wishes to rid the title of the lien of defendant's mortgage. She will be as fully protected upon such a foreclosure as she would have been upon the original foreclosure had she made him a party to it.

The plaintiff may have the ordinary decree of foreclosure against the defendant in this action if she so desires, and all persons who are necessary parties defendant are brought in. It is not seen how any relief can be afforded without the presence of the purchasers of the other two parcels of the mortgaged premises. If it is sought to re-foreclose plaintiff's mortgage, they are unquestionably necessary parties, as the owners of separate portions of the property mortgaged, and by their purchases they have respectively acquired an interest in plaintiff's mortgage. If the court is asked to apportion either the plaintiff's or the defendant's mortgage between the three farms, they are necessary parties to a determination of that question. They would not be bound by any judgment rendered in this action which adjudged the extent of the lien of either mortgage upon their respective properties, and such adjudication would be necessarily involved in the ascertainment of the amount of either mortgage equitably chargeable upon the several parcels. In such a case the objection of a defect of parties is available, although not raised by demurrer of answer. The plaintiff is not entitled to the equitable relief sought, if it

appears that a complete determination of the controversy cannot be had without the presence of other parties, and the court must direct them to be brought in (Code, § 452); and where it appears upon appeal that this has not been done, the court will reverse the judgment, although the issue is not made by the pleadings. (*Bear v. Am. Rapid Tel. Co.*, 36 Hun, 400.) If the plaintiff obtains leave to amend by bringing in all necessary parties, she may have a decree for a foreclosure of her mortgage as against the defendant, and a sale of the mortgaged premises, in which decree the equities of the different purchasers, as between themselves, can be properly adjusted, and the court can direct the application of the net rents and profits upon the mortgage debt, in ascertaining the amount which the plaintiff and her co-owners of the mortgage are entitled to receive upon a sale of the property. In general terms, we think this is the extent of the relief to which she is entitled under the pleadings and proofs in this action.

The judgment must, therefore, be reversed, and a new trial granted if plaintiff elects within sixty days after filing the remittitur in the court below to proceed with the action, and applies for leave to amend by bringing in the necessary parties. If such leave is not applied for or granted the complaint is dismissed, with costs in this court and in all courts; if leave to amend is granted, costs in this court to abide the determination of the Supreme Court as to the conditions upon which leave to amend may be granted.

All concur.

RYAN *v.* HOLLIDAY

SUPREME COURT OF CALIFORNIA, 1895

(110 Cal. 335)

VAN FLEET, J. The judgment in this case must be reversed for want of any averment that the note secured by the mortgage sought to be foreclosed has not been paid. The only allegation in this regard is:

"That the interest on said note and mortgage has been paid in full up to the eleventh day of September, 1894, and there is now due and owing to the plaintiff the sum of twelve hundred dollars (\$1,200), with interest thereon at the rate of twelve per cent per annum from the eleventh day of September, 1894."

This is not the equivalent of an averment of non-payment. The language, "There is now due," etc., is but a conclusion of law and not the averment of a fact. The breach of the contract to pay is of the essence of the cause of action and must be alleged. (*Frisch v. Caler*, 21 Cal. 71; *Scroufe v. Clay*, 71 Cal. 123; *Roberts v. Treadwell*, 50 Cal. 521; *Barney v. Vigoreaux*, 92 Cal. 631.) The fact that no demurrer was interposed and that judgment went by default makes no essential difference, since the defect goes to the statement of a cause of action (*Barney v. Vigoreaux*, *supra*); and that defect is not waived by a failure to demur. (Code Civ. Proc., sec. 434.)

While we are reluctant, as suggested in *Notman v. Green*, 90 Cal. 173, to reverse a judgment upon such a technicality, and especially in favor of a defendant who has apparently stood by and permitted the court below to overlook an error, susceptible of easy correction, and then takes advantage of such error on appeal; and while we would avoid the necessity, if possible, on the other hand, that consideration is largely neutralized by the further one, that a party guilty of such an inexcusable breach of good pleading as is here exhibited is not entitled to have it lightly condoned, but should suffer the consequences.

The objection that the complaint should have averred either a presentation of a claim against the estate of appellant's intestate, or an express waiver of any recourse against the general estate, is not well taken. Section 1500 of the Code of Civil Procedure has no application to the facts of this case. The note and mortgage sued on were not in any sense a claim against the estate of said intestate. The latter was not the maker of the note or mortgage, nor did a demand of any character exist thereunder against the estate. The representative was made a party defendant solely by reason of the fact that subsequently to the making of the mortgage in suit the mortgaged land was purchased by said intestate in his lifetime, and the title thereto rested in his estate at his death, subject to the mortgage lien. It was necessary to make his representative a party only for the purpose of foreclosing the rights of the estate in the land and for that purpose alone. The estate of said intestate was in no way holden for any deficiency that might arise out of sale of the property, nor was any such relief asked or taken. There was, therefore, no claim to be presented against said estate. The section referred to applies only to instances where the note and mortgage constitute a claim against the estate of the deceased.

The judgment is reversed and the cause remanded with directions to the court below to permit plaintiff to amend his complaint.

HARRISON, J., and GAROUTTE, J., concurred.

TRENOR v. LE COUNT

SUPREME COURT OF NEW YORK, GENERAL TERM, SECOND
DEPARTMENT, 1895

(84 Hun, 426)

APPEAL by the plaintiff, John H. Trenor, as trustee for Minnie J. Rice, from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 27th day of October, 1894, directing the discontinuance of the action and the cancellation of the *lis pendens* upon the payment to the plaintiff of the amount due him for interest upon the mortgage mentioned in the complaint, and the costs of the action to the time of the order.

CULLEN, J. This action is brought to foreclose a mortgage which contained the usual thirty days' interest clause. Default having been made in the payment of the interest for more than thirty days the plaintiff elected that the principal should become due and instituted this foreclosure. The defendants, on affidavits charging the plaintiff's attorney with unfriendly feeling towards the defendants and a desire on his part to harass them, applied for an order staying the action. On that application the court made an order directing the action to be discontinued upon defendants paying to the plaintiff the interest in default and the costs of the action to the time of the order. From that order the plaintiff appeals.

We think the order was erroneous. There was no charge of fraud or collusion upon the part of the plaintiff or his attorney by which the defendant was prevented from paying the interest or misled in that respect. In the absence of conduct of that character the motives of the plaintiff or his attorney in foreclosing the mortgage are immaterial. The plaintiff is simply enforcing his legal right. The defendant Fannie A. Le Count asserts in her affidavit that after the default the plaintiff promised to receive the interest from her if paid by a specified time. This promise the plaintiff denies. The agreement would seem invalid as without

consideration, but whether valid or not its force and effect could only be determined by a proper plea in that respect and the trial of the issue raised by the plea. (*Bennett v. Stevenson*, 53 N. Y. 508.)

The order appealed from should be reversed and motion denied, with ten dollars costs and disbursements.

PRATT, J., concurred; DYKMAN, J., not sitting.

Order reversed, with ten dollars costs and disbursements.

SUMMERS v. BROMLEY

SUPREME COURT OF MICHIGAN, 1873

(28 Mich. 125)

GRAVES, J. This was an ordinary foreclosure cause on a mortgage made by defendant, Barton M. Bromley, to complainant's assignor, and dated March 9th, 1868. The only statement in the bill connecting the other defendants with the subject of the suit, or in any way implicating them, is one made under general rule ninety-one of the rules in chancery, and is in these terms: "And your orator further shows unto this court that Joseph Emerson, William Burbank, Jefferson Jones, John Barr, and Olive Bromley, have or claim some interest in the said mortgaged premises, or in some part thereof, as purchasers, mortgagees or otherwise, which interests, if any, have accrued subsequent to the lien of the said mortgage, and are subject thereto." None of the defendants, except two of those brought in under this particular allegation, namely, Emerson, and Olive Bromley, made defense. They put in separate answers, but their answers exhibited the same ground of defense, and it was, that when the mortgage was given the defendant Olive was the absolute and exclusive owner of the premises, and that the defendant Emerson succeeded to her absolute and exclusive title, by conveyance from her. It is true that the validity of this position was made to depend upon the genuineness of an instrument antedating the mortgage, and which was placed on record and purported to be a deed of the premises from the defendant Olive Bromley, to the mortgagor Barton M. Bromley. But the question of forgery connected with the alleged deed was merely something involved in the defense, and needed to maintain it. It was not the fundamental defense itself. The ultimate and substantial question was, in whom did the title reside. On

the face of the papers it purported to reside in the mortgagor, Barton M. Bromley. The defense insisted that when the mortgage was given, it resided in Olive Bromley, who transferred to Emerson, in whom it had since continued to reside, and therefore that neither the mortgagor nor mortgagee possessed any title. The very gist of the defense was, the assertion of a title both hostile and paramount to that claimed for the mortgagor and mortgagee. On this the controversy was made to hinge. The complainant filed the usual general replication, and the parties went at great length into proofs upon this disputed question of title, and the court below decreed foreclosure and sale in the ordinary form, and in terms provided for barring defendants, and for giving possession to the purchaser. The defendant Emerson, who claimed under Olive as owner of the adverse and superior title, alone appealed.

This case has been argued with great fullness and ability, and it is much to be regretted that the litigation cannot be now closed. But that is impossible. The circumstances of the case, and the settled rules of law, are so plainly opposed to such a result as to preclude all doubt. The difficulty is at least twofold, and it is fundamental as well as formal. The real question was strictly legal, and one proper for a court of law. *Welby v. Duke of Rutland*, 6 Bro. Par. Cas., 575; *Hipp v. Babin*, 19 How. 271.

In the first place, it is not competent in a foreclosure suit, whatsoever the pleadings, to proceed to litigate and settle the right of a party who sets up a legal title which, if valid, is adverse and paramount to the title of both mortgagor and mortgagee. *Chamberlain v. Lyell*, 3 Mich. 448; *Wurcher v. Hewitt*, 10 Mich. 453; *Banks v. Walker*, 3 Barb. Ch. 438; *Eagle Fire Co. v. Lent*, 6 Paige, 637; *Holcomb v. Holcomb*, 2 Barb. S. C., 20; *Corning v. Smith*, 2 Seld. 82; *Lewis v. Smith*, 11 Barb. 152, S. C., 5 Seld. 502. Our legislation respecting foreclosure proceedings does not countenance such litigation. The passage in the statute (*Comp. L.*, § 5154), which declares that the commissioner's deed shall be an entire bar against each of the parties, must be construed with the preceding and other members of the section so as to harmonize therewith and with the general spirit of the law. It cannot rightly be held to mean that in case neither the mortgagor or mortgagee had any title, the commissioner's deed shall have the effect to give the purchaser one, by barring the true owner. A court of equity is not the appropriate tribunal, nor is a foreclosure suit a suitable proceeding, for the trial of claims to the legal title which are hostile

and paramount to the interests and rights and titles of both mortgagor and mortgagee. Such a trial will neither fall in with the nature of the jurisdiction, or the genius or frame of the particular remedy.

But, second, if it were possible to regularly investigate such a question, and from the record aptly made up in a foreclosure case, work out a decree directed to the adjudication of the point upon the title, the present bill is not so framed as to admit of it.

No issue is made by the pleadings upon this question of superiority of title, or even upon the subordinate and subsidiary controversy respecting the forgery of the deed. The bill affords no basis for any such issue. That proceeds agreeably to the rule of the court, and merely charges the defendants, Emerson and Olive Bromley, as persons claiming *subordinate* rights and interests. There is, then, no foundation in the bill for any decree upon the question of title. See the cases last cited, also *Warner v. Whitaker*, 6 Mich. 133; *Wright v. Dudley*, 8 Mich. 115; *Barrows v. Baughman*, 9 Mich. 213; *Moran v. Palmer*, 13 Mich. 367.

It was not competent for the court below, and it is not competent for this court, to decree upon and bind the right set up by Emerson, and no writ of assistance could be rightly awarded to turn him out of possession. The purchaser must be left to try the hostile title set up by Mrs. Bromley and Emerson, in ejectment, where a jury may pass upon the question raised by the charge of forgery. That question is a very proper one to be submitted to such a tribunal, while it is correctly considered as extremely unfit for a court of equity, unless the case is found to be a plain one. *Barnesly v. Povel*, 1 Ves. Sr. 120.

The decree appears to be well enough as against the mortgagor, Barton M. Bromley, but it must be modified so far as to save it from operating against the adverse paramount right and title set up by Emerson and Olive Bromley, and so as to exclude any right to a writ of assistance, except as against Barton M. Bromley and the parties, if any, holding under him subsequent to the mortgage.

It would seem that both sides have been somewhat at fault in their proceeding to carry on an inadmissible controversy. It does not appear that any objection was raised anywhere to the irregularity. On the contrary, all seem to have accepted the conflict willingly. The point should have been raised below, and in season. If it had been, it is to be presumed that the court below would

have dealt with it correctly. I am therefore inclined to think that neither party ought to recover costs as against the other.

The cause should be remitted to the court below to carry out the decree as modified.

COOLEY and CAMPBELL, JJ., concurred.¹

CHRISTIANCY, Ch. J. I concur in the result, upon the ground that the title could not be litigated under this bill. I express no opinion whether it could properly have been contested under pleadings which should distinctly put the question of title in issue.

NUTT v. CUMING

COURT OF APPEALS OF NEW YORK, 1898

(155 N. Y. 309)

HAIGHT, J. On the 9th day of August, 1882, the defendant Cuming recovered a judgment against one Thomas Kerrigan, which became a lien upon real estate subject to the lien of a mortgage theretofore executed, bearing date the 14th day of January, 1882. On the 1st day of October, 1891, an action was brought to foreclose the mortgage, which resulted in the entering of the usual judgment of foreclosure and sale on the 13th day of January, 1892. The sale of the property under the judgment did not, however, take place until December, 1896, and after the expiration of ten years from the entry of the Cuming judgment. The special Term held that Cuming was entitled to have his judgment paid out of the surplus moneys arising on the sale. The Appellate Division reversed this part of the order, holding that the lien of the judgment had ceased to exist before the sale took place under the foreclosure judgment, and that, therefore, no lien in favor of Cuming was transferred to the surplus moneys.

It is now claimed that the foreclosure judgment having been entered before the expiration of the ten years from the entry of the Cuming's judgment the lien was, by operation of law, transferred to the surplus moneys that should arise upon the sale of the premises as of the day of the entry of the foreclosure judgment, and that from that time he was barred and foreclosed of all right, title, interest or equity of redemption in the mortgaged premises. We do not so understand the law. The judgment of foreclosure first determined the amount due upon the mortgage. It then

¹ Accord, *McCamman v. Davis*, 162 Mich. 435, 438 (1910).

provided for a sale of the premises at public auction by a referee appointed for that purpose, who was directed to execute and deliver to the purchaser a deed, and out of the moneys arising from the sale to pay the fees, expenses, taxes and allowance to attorneys, and then the amount due upon the mortgage. The surplus arising from the sale it required to be paid over to the chamberlain of the city of New York, subject to the further order of the court. It then adjudged "that the defendants and all persons claiming under them, or any, or either of them, after the filing of such notice of pendency of this action, be forever barred and foreclosed of all right, title, interest and equity of redemption in the said mortgaged premises so sold or any part thereof." It will thus be observed that under the provisions of the judgment the right, title and interests of the defendants became barred and foreclosed, not upon the date of the entry of the judgment, but from and after the sale of the premises and the conveyance made thereunder.

The Code, after specifying the various steps necessary to be taken in the foreclosure of a mortgage, provides that "A conveyance upon a sale, made pursuant to a final judgment, in an action to foreclose a mortgage upon real property, . . . is as valid, as if it was executed by the mortgagor and mortgagee, and is an entire bar against each of them, and against each party to the action who was duly summoned, and every person claiming from, through, or under a party, by title accruing after the filing of the notice of pendency of the action." (§ 1632.) Here the legislature gives to the conveyance the same force and effect that is given by the judgment. One is in harmony with the other.

Rule 64 of the General Rules of Practice provides that "On filing the report of the sale any party to the suit, or any person who had a lien on the mortgaged premises at the time of the sale, upon filing with the clerk where the report of sale is filed a notice, stating that he is entitled to such surplus moneys or some part thereof, and the nature and extent of his claim, may have an order of reference," etc. It is the lien existing at the time of the sale that is transferred to the surplus moneys arising therefrom. If, at that time, no lien exists, there is nothing which can be transferred to the fund. Judgments over ten years old cease to be liens upon real estate, and, consequently, are not payable out of the surplus. (*Floyd v. Clark*, 16 Daly, 528; *Fliess v. Buckley*, 90 N. Y. 286; *I. & T. Nat. Bank v. Quackenbush*, 143 N. Y. 567; *Tufts v. Tufts*, 18 Wend. 621; *Graff v. Kips*, 1 Edwards Ch. 619; *Roe v. Swart*, 5 Cowen, 294.)

A mortgage upon real property may be foreclosed and the lands sold under the statute without an action. An action may be maintained to bar and foreclose all persons claiming an interest in or an equity of redemption, and for a sale of the lands for the purpose of paying the indebtedness due upon the mortgage. The chief object is the collection of the indebtedness, which can be effected only by a sale. A judgment entered in a foreclosure action is final for all purposes of review, but in other respects it is interlocutory. All of the proceedings for the sale, including the advertising of the notice and the confirmation of the sale, take place thereafter. The provision barring others of their interest in, or of their rights of equity of redemption in the mortgaged premises, of necessity relates to the final concluding act, that of a sale of the premises. Until that time the mortgagee or the owner of the equity of redemption may redeem, and persons having judgment liens thereon may sell upon execution, notwithstanding the judgment, but, as soon as the sale is made, confirmed, and conveyance delivered, that provision of the judgment becomes operative and of full force, and the parties to the action are forever thereafter barred and foreclosed of all of their right, title, interest and equity of redemption.

The other questions involved were properly disposed of by the Appellate Division.

PARKER, Ch. J., MARTIN and VANN, JJ., concur; O'BRIEN, J., reads for reversal,¹ and BARTLETT, J., concurs; GRAY, J., absent.

Order affirmed, with costs.

WEINSTEIN v. SINEL

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT, 1909

(133 App. Div. 441)

APPEAL by the defendants, Solomon Frank and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 11th day of January, 1909, upon the decision of the court rendered after a trial at the Kings County Special Term.

¹ The dissenting opinion is omitted.

Judgment affirmed, with costs, on the opinion of Mr. Justice CARR at Special Term.

HIRSCHBERG, P. J., WOODWARD, BURR and RICH, JJ., concurred.

The following is the opinion delivered at Special Term:

CARR, J. This is an action to foreclose a second mortgage. All the parties defendant are in default except the defendants Frank and Danowitz, who were made parties because they had guaranteed the payment of the mortgage debt. They are proper parties defendant in this action. (*Robert v. Kidansky*, 111 App. Div. 475.) These defendants resist judgment on the ground that the bond and mortgage were not due at the beginning of the action. The period of maturity provided by the bond and mortgage is August 1, 1911. The plaintiff sues upon the claim that by reason of a default on the part of the owners of the property in paying the interest on a prior or first mortgage he had the right to and did elect that the second mortgage should become immediately due and payable. The important question in the case arises upon the construction to be given to a clause in the second mortgage which is said to give such right of election. This question is to be determined according to the manifest intention of the parties as shown by writing.)

The parties to the second mortgage used a printed form, such as law stationers sell, and which are in common use by the legal profession. This form contained a clause marked "Seventh" which provided as follows: "Seventh: And the said mortgagor does further covenant and agree that in default of the payment of all taxes, charges and assessments which may be imposed by law upon the said mortgaged premises or any part thereof, that it shall and may be lawful for the said mortgagee, without notice to or demand from the mortgagor, to pay the amount of any such tax, charge or assessment with any expenses attending the same, and any amount so paid the said mortgagor covenants and agrees to repay to the said mortgagee, with interest thereon, without notice or demand, and the same shall be a lien on the said premises and be secured by the said bond and by these presents; and the whole amount hereby secured, if not then due, shall thereupon if the said mortgagee so elect become due and payable forthwith."

As there was a prior mortgage on the premises, specifically referred to in this instrument in question, the draftsman of the second mortgage inserted in the "Seventh" clause of the printed form the words "interest on prior mortgage," so that the clause read: "And the said mortgagor does further covenant and agree

that in default of the payment of all taxes, interest on prior mortgage, charges and assessments which may be imposed by law upon the said mortgaged premises or any part thereof, that it shall and may be lawful for the said mortgagee, without notice to or demand from the mortgagor, to pay the amount of any such tax, charge or assessment," etc.

The draftsman, however, neglected to reinsert the words "interest on prior mortgage" in subsequent lines of the mortgage, where the words "tax, charge or assessment" appear. As a result of this omission the defendants contend that the final provision of the clause, "and the whole amount hereby secured, if not then due, shall thereupon, if the said mortgagee so elect, become due and payable forthwith," does not apply to a case where there has been a default in the payment of interest on prior mortgage. A default did occur in the payment of interest on prior mortgage, and the plaintiff, to protect his security, paid some \$1,400 as accrued interest on the first or prior mortgage. This first mortgage was in the sum of \$52,500, on which interest was payable half yearly in amounts of \$1,443.75.

If the defendants' contention as to the effect of the clause in the second mortgage is correct, then the mortgagors were in a position that they could stand by and compel their mortgagee to pay the interest on the first mortgage every time it accrued in order to protect his security of the second mortgage without having any remedy against them except by subrogation at the fixed maturity of the mortgage. This result will be so extraordinary as to require the plainest evidence that the parties so contracted.

It seems to me, on the contrary, that the parties to the second mortgage never so intended. The "Seventh" clause in the second mortgage, which is the one in suit, gives the mortgagee the right to pay the interest on the first mortgage whenever it becomes due, and the last provision of that clause related back to a default in the payment of the "interest on prior mortgage," as well as to a default in the payment of "all taxes," etc. The word "all" here is used in the sense of "any," as is shown by the latter use in the same clause of the words, "any such tax, charge or assessment."

The defendants further contend that inasmuch as the plaintiff began this action four days after he paid the interest on the first mortgage this court should deny him relief on the ground that his election to treat his mortgage as immediately due and payable is inequitable and oppressive on defendants. They urge the decision in *Germania Life Ins. Co. v. Potter*, (124 App. Div. 814),

as sanctioning a dismissal of the plaintiff's complaint on this ground. That case must be confined to its precise facts where the court held that the plaintiff's course of dealing with the defendant mised the defendant. Without such a finding that decision would be in flat opposition with a long line of authorities which settled the law on this point for several generations. (*Smith v. Lamb*, 59 Misc. Rep. 568.)

I find no satisfactory evidence in this case that the plaintiff in any way misled the defendants. Judgment is directed for the plaintiff against all the defendants for a foreclosure of the mortgage in suit. Provision is to be made in the findings and judgment defining the contingent liability of these two defendants as guarantors to the amount stated in their written guaranty.

NEW YORK CODE CIV. PROC., § 1626. *Final judgment; what to contain.* In an action to foreclose a mortgage upon real property, if the plaintiff becomes entitled to final judgment, it must direct the sale of the property mortgaged, or of such part thereof as is sufficient to discharge the mortgage debt, the expenses of the sale, and the costs of the action.

§ 1627. *Person liable for mortgage debt may be made defendant, etc.* 1. Any person who is liable to the plaintiff for the payment of the debt secured by the mortgage may be made a defendant in the action and if he has appeared or has been personally served with the summons, the final judgment may award payment by him of the residue of the debt remaining unsatisfied, after a sale of the mortgaged property, and the application of the proceeds, pursuant to the directions contained therein. . . .

§ 1631. *Notice of pendency of action to be filed.* The plaintiff must, at least twenty days before a final judgment directing a sale is rendered, file, in the clerk's office of each county where the mortgaged property is situated, a notice of the pendency of the action, as prescribed in section 1670 of this act; which must specify in addition to particulars required by that section, the date of the mortgage, the parties thereto, and the time and place of recording it.

§ 1632. *Effect of conveyance upon sale.* A conveyance upon a sale, made pursuant to a final judgment, in an action to foreclose a mortgage upon real property, vests in the purchaser the same estate, only, that would have vested in the mortgagee, if the equity of redemption had been foreclosed. Such a conveyance is

as valid, as if it was executed by the mortgagor and mortgagee, and is an entire bar against each of them, and against every person claiming from, through or under a party, by title accruing after the filing of the notice of the pendency of the action, as prescribed in the last section.

§ 1636. *When part only of the property to be sold.* Where the mortgage debt is not all due, and the mortgaged property is so circumstanced, that it can be sold in parcels without injury to the interests of the parties, the final judgment must direct, that no more of the property be sold, in the first place, than is sufficient to satisfy the sum then due, with the costs of the action and expenses of the sale; and that upon a subsequent default in the payment of principal or interest, the plaintiff may apply for an order, directing the sale of the residue, or of so much thereof as is necessary to satisfy the amount then due, with the costs of the application and the expenses of the sale. The plaintiff may apply for and obtain such an order, as often as a default happens.

§ 1637. *When the whole property may be sold.* If, in a case specified in the last three sections, it appears that the mortgaged property is so circumstanced, that a sale of the whole will be most beneficial to the parties, the final judgment must direct, that the whole property be sold; that the proceeds of the sale, after deducting the costs of the action and the expenses of the sale, be either applied to the satisfaction of the whole sum secured by the mortgage, with such a rebate of interest, as justice requires; or be first applied to the payment of the sum due, and the balance, or so much thereof as is necessary, be invested at interest, for the benefit of the plaintiff, to be paid to him from time to time, as any part of the principal or interest becomes due.

FORMS

The following short form of instrument for mortgage of real property is lawful in New York (Real Property Law, sec. 258), but the use of other forms is not prevented or invalidated:

MORTGAGE

This indenture, made the day of in the year nineteen hundred and , between , of , party of the first part, and , of , party of the second part.

Whereas, the said is justly indebted to the said party of the second part in the sum of dollars, lawful money of the United States, secured to be paid by his certain bond or obligation, bearing even date herewith, conditioned for the payment of the said sum of dollars, on the day of , nineteen hundred and , and the interest thereon, to be computed from , at the rate of per centum per annum, and to be paid .

It being thereby expressly agreed that the whole of the said principal sum shall become due after default in the payment of any instalment of principal, interest, taxes or assessments, as herein-after provided.

Now, this indenture witnesseth, that the said party of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, and also for and in consideration of one dollar, paid by the said party of the second part, the receipt whereof is hereby acknowledged, doth hereby grant and release unto the said party of the second part, and to his heirs (or successors) and assigns forever (description), together with the appurtenances, and all the estate and rights of the party of the first part in and to said premises. To have and hold the above granted premises unto the said party of the second part, his heirs and assigns forever. Provided, always, that if the said party of the first part, his heirs, executors or administrators, shall pay unto the said party of the second part, his executors, administrators or assigns, the said sum of money mentioned in the condition of the said bond or obligation,

and the interest thereon, at the time and in the manner mentioned in the said condition, that then these presents, and the estate hereby granted, shall cease, determine and be void. And the said party of the first part covenants with the party of the second part as follows:

1. That the said party of the first part will pay the indebtedness as hereinbefore provided and if default be made in the payment of any part thereof, the party of the second part shall have power to sell the premises therein described according to law.

2. That the said party of the first part will keep the buildings on the said premises insured against loss by fire for the benefit of the mortgagee.

3. And it is hereby expressly agreed that the whole of said principal sum shall become due at the option of the said party of the second part after default in the payment of any instalment of principal or of interest for days, or after default in the payment of any tax or assessment for days after notice and demand.

In witness whereof, the said party of the first part hath hereunto set his hand and seal, the day and year first above written.

In the presence of:

The following short form of instrument for mortgage on lease of real property is lawful in New York (Real Property Law, sec. 273), but the use of other forms is not prevented or invalidated:

MORTGAGE ON LEASE OF REAL PROPERTY

This indenture, made the day of , in the year one thousand hundred and , between of (insert residence) of the first part and of (insert residence) of the second part; whereas did, by a certain indenture of lease, bearing date the day of , in the year one thousand nine hundred and , demise, lease and to farm let unto and to executors, administrators and assigns, all and singular the premises hereinafter mentioned and described, together with their appurtenances; to have and to hold the same unto the said and to executors, administrators and assigns, for and during and until the full end and term of years, from the day of one thousand nine hundred and , fully to be complete and ended, yielding and paying therefor

unto the said and to or assigns, the yearly rent or sum of

And whereas, the said part of the first part justly indebted to the said part of the second part, in the sum of lawful money of the United States of America, secured to be paid by certain bond or obligation, bearing even date herewith, conditioned for the payment of the said sum of on the day of nineteen hundred and and the interest thereon to be computed from at the rate of per centum per annum and to be paid .

It being thereby expressly agreed that the whole of the said principal sum shall become due at the option of the mortgagee or obligee after default in the payment of interest, taxes or assessments or rents as hereinafter provided.

Now this indenture witnesseth that the said part of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, and also for and in consideration of the sum of one dollar, paid by the said part of the second part, the receipt whereof is hereby acknowledged, doth grant and release, assign, transfer and set over unto said part of the second part, and to his heirs (or successors) and assigns forever.

(Description)

Together with the appurtenances and all the estate and rights of the part of the first part of, in and to said premises under and by virtue of the aforesaid indenture of lease.

To have and hold the said indenture of lease and renewal, and the above granted premises, unto the said part of the second part, his heirs and assigns, for and during all the rest, residue and remainder of the said term of years yet to come and unexpired, in said indenture of lease and in the renewals therein provided for subject, nevertheless, to the rents, covenants, conditions and provisions in the said indenture of lease mentioned.

Provided always that if the said part of the first part shall pay unto the said part of the second part, the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon, at the time and in the manner mentioned in the said condition, that then these presents and the estate hereby granted, shall cease, determine and be void.

And the said part of the first part covenant with the said part of the second part as follows:

First. That the part of the first part will pay the indebtedness as hereinbefore provided.

And if default shall be made in the payment of any part thereof the said part of the second part have power to sell the premises therein described according to law.

Second. That the said premises now are free and clear of all incumbrances whatsoever, and that ha good right and lawful authority to convey the same in manner and form hereby conveyed.

Third. That the part of the first part will keep the buildings on the said premises insured against loss by fire, for the benefit of the mortgagee.

Fourth. That the part of the first part will pay the rents and other charges mentioned in and made payable by said indenture of lease within days after said rent or charges are payable.

Fifth. And it is hereby expressly agreed that the whole of the said principal sum shall become due at the option of the said mortgagee or obligee after default in the payment of any instalment of principal, or after default in the payment of interest for

days, or after default in the payment of any rent or other charge made payable by said indenture of lease for days, or after default in the payment of any tax or assessment for days after notice and demand.

In witness whereof, the said part of the first part to these presents ha hereunto set hand and seal the day and year first above written.

Scaled and delivered }
in the presence of }

